FILE COPY

Office-Supreme Court, U.S.
FILED
JUL 13 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 272

TRUNKLINE GAS COMPANY,

Petitioner,

v.

HARDIN COUNTY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CECIL N. COOK
1100 Esperson Building
Houston 2, Texas

Counsel for Petitioner,
Trunkline Gas Company

Of Counsel:

BUTLER, BINION, RICE & COOK
1100 Esperson Building
Houston 2, Texas

BAKER & DANIELS
810 Fletcher Trust Building
Indianapolis, Indiana

PRINTED IN U.S.A. — BY DeLARUE/TEXAS

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT	3
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	23
APPENDIX A — Opinions and Judgments of the Court of Appeals	25
APPENDIX B — Statutes	43
APPENDIX C — Conflicting Texas Decisions	51
APPENDIX D — Conflicting Opinions of the Attorney General of Texas	63

CITATIONS

Cases

Anderson County Road District No. 8 v. Pollard, 296 S.W. 1062	8, 11
Barrington v. Cokinos, 338 S.W. 2d 133	10, 11
Brown v. Truscott Independent School District, 34 S.W. 2d 837	9
Buckeye Pipe Line Company v. Keating, 229 F. 2d 795	21, 22
Caldwell v. Crosser, 20 S.W. 2d 822	9
City of Meridian v. Southern Bell Telephone & Telegraph Company, 358 U.S. 639	21
Clark v. Greer, 232 S.W. 2d 876	17
Corsicana Cotton Mills, Inc. v. Sheppard, 71 S.W. 2d 247	10
Department of Highways v. United Gas Pipe Line Company, 258 F. 2d 357, 359	11
Driscoll v. Edison Light & Power Company, 307 U.S. 104, 115	16
Duncan v. City of Waco, 81 S.W. 2d 57	8

PAGE

Farrier v. Calvert, 315 S.W. 2d 40 16
Fidelity Union Trust Company v. Field, 311 U.S. 169 15
Ft. Worth Cavalry Club, Inc. v. Sheppard, 83 S.W. 2d 660 10
Fox v. Standard Oil Company of New Jersey, 294 U.S. 87 16

Garey v. The City of Galveston, 42 Tex. 627 9
Gaynor Const. Co., Inc. v. Board of Trustees, 233 S.W. 2d 472 16

Henson v. Commissioners' Court of Henderson County, 56 S.W. 2d 240 9

Magnolia Pipe Line Company v. City of Tyler, 348 S.W. 2d 537 ..... 12, 15, 18, 23, 58
Matlock v. Dallas County Arcadia Fresh Water Supply Dist. No. 1, 12 S.W. 2d 181 8
Morris & Cummings v. State, 62 Tex. 728 9
McLennan County v. Sinclair Pipe Line Company, 323 S.W. 2d 471 ..... 11, 12, 13, 18, 23, 51

Nichols v. State, 32 S.W. 452 10
Nolan County v. State, 17 S.W. 823 9

Panhandle Eastern Pipe Line Company v. State Highway Commission of Kansas, 294 U.S. 613 ..... 11, 21, 22

Robbins v. Limestone County, 268 S.W. 915 10

San Antonio River Authority v. Shepperd, 299 S.W. 2d 920 11
Sinclair Pipe Line Company v. Archer County, 147 F. Supp. 650 ..... 14, 15, 18
Sinclair Pipe Line Company v. Archer County, 245 F. 2d 79 ..... 14, 15, 18
Sinclair Pipe Line Company v. State, 322 S.W. 2d 58.... 14, 18, 23, 54
Six Companies of California v. Joint Highway District No. 13, 311 U.S. 180 15
Stanford v. Butler. 181 S.W. 2d 269 19
State v. Ragland Clinic-Hospital, 159 S.W. 2d 105 10
State of California v. Taylor, 353 U.S. 553 15

The Union Insurance Company v. Hoge, 21 How. 35 16
Tom Green County v. Moody, 289 S.W. 381 9
Trinity Portland Cement Co. v. State, 144 S.W. 2d 329 16
Trunkline Gas Company v. Hardin County, 375 U.S. 8 ..... 1, 3
Twing v. Rhodes, 16 S.W. 2d 258 8

United Gas Pipe Line Co., v. Ideal Cement Co., 369 U.S. 134 21
United States v. Turner Turpentine Co., 111 F. 2d 400 19

PAGE

West v. American Telephone & Telegraph Company, 311 U.S. 223 15

Western Union Telegraph Co. v. Wichita County Water Improvement Dist. No. 1, 30 S.W. 2d 301 8

Constitutional Provisions

Texas Constitution, Article III

Section 44 ..... 3, 8, 10, 43

Section 51 ..... 3, 8, 11, 43

Section 52 ..... 3, 8, 11, 42

Section 53 ..... 3, 8, 10, 11, 45

Section 55 ..... 3, 8, 11, 55

Statutes

Vernon's Annotated Civil Statutes

Article 2524-1 21

Article 6673 ..... 3, 17, 46

Article 6674c-1 ..... 3, 16, 17, 18, 46

Article 6674n 3, 13, 17, 47

Article 6674n-3 ..... 3, 6, 8, 12, 18, 20, 49

Article 6674q-4 ..... 3, 13, 17, 18, 49

Opinions of the Attorney General of Texas

Opinion No. O-2405-A, October 9, 1940 ..... 16, 76

Opinion No. WW-125, March 22, 1957 ..... 16, 18, 71

Opinion No. 1004, March 6, 1961 ..... 16, 18, 67

Opinion No. 1090, July 12, 1961 ..... 16, 18, 63

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

TRUNKLINE GAS COMPANY,

Petitioner,

v.

HARDIN COUNTY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Earl Warren,
Chief Justice of the United States,
and the Associate Justices of the
Supreme Court of the United States:

Petitioner, Trunkline Gas Company, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause April 15, 1964.

OPINIONS BELOW

The District Court did not render an opinion. The first opinion of the Court of Appeals (R. 238-243) is reported at 311 F. 2d 882. The first judgment of the Court of Appeals was vacated and the case remanded to the Court of Appeals by order of this Court reported at 375 U.S. 8. The opinion of the Court of Appeals on remand (Supp. R. 85-97) has not yet been reported. The first opinion and judgment of the Court of Appeals are set out in full in Appendix A, *infra*,

pp. 25-31, and the second opinion and judgment of the Court of Appeals, on remand, are set out in full in Appendix A, *infra*, pp. 32-42.

JURISDICTION

The first judgment of the Court of Appeals was entered on January 9, 1963 (R. 244). Petitioner timely filed its petition for rehearing on January 26, 1963 (R. 245-263), and the Court of Appeals overruled such petition by order entered on February 27, 1963 (R. 275). Petitioner timely filed its first petition for certiorari, and by order of October 14, 1963, this Court granted such petition, vacated the judgment of the Court of Appeals, and remanded the case to that Court. On April 15, 1964, the Court of Appeals entered its second judgment. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether, as held by the Court of Appeals, the Texas curative statute applicable to this case, Vernon's Ann. Civ. Stats. Article 6674n-3, is void under the Texas Constitution.

2. Whether Texas counties have legal authority to compensate for casing of pipe lines in private easements when the casing is required for construction of new State highway facilities across such easements.

3. Whether a requirement that a pipe line be cased under a private pipe line easement by its owner, for new highway construction by the State across the easement, constitutes a taking of the easement.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Texas Constitution are Sections 44, 51, 52, 53 and 55 of Article III, and are set out in Appendix B, *infra*, pp. 43-46. The pertinent statutes are Vernon's Annotated Civil Statutes, Articles 6673, 6674c-1, 6674n, 6674n-3 and 6674q-4. Such statutes, together with the volume and page where each may be found in the official edition, are set out in Appendix B, *infra*, pp. 46-50.

STATEMENT

This case has previously been before this Court. *Trunkline Gas Company* v. *Hardin County*, 375 U.S. 8 (No. 153, October Term, 1963). The suit, in which federal jurisdiction is based upon diversity of citizenship, was brought by Petitioner, a natural gas pipe line company incorporated under the laws of Delaware, to recover the cost of casing its pipe line required for the construction of new highway facilities on right of way acquired by Respondent, a county of the State of Texas, across Petitioner's pipe line easements and the line located therein. (R. 2-8)

In 1951 Petitioner purchased pipe line easements from the owners of lands abutting U. S. Highway 69 and F. M. Highway 418 in Hardin County, Texas, and constructed its pipe line thereunder (R. 14, 19, 233-235). Petitioner also constructed its line under and across each of said highways and at that time cased that portion of its line under the entire width of the highway rights of way as same then existed (R. 14, 19).

Thereafter, the State Highway Department determined to widen said highways, which necessitated the acquisition of new and additional rights of way. Such new and addi-

tional rights of way crossed Petitioner's pipe line and easements. The State Highway Department required that Respondent, at its own cost, acquire the necessary additional rights of way across Petitioner's pipe line and easements for the two construction projects, free and unencumbered, free of all obstructions and encroachments, and without any cost or expense to the State (R. 86, 104, 125-127). Respondent agreed and undertook so to acquire said new rights of way (R. 103, 115, 130, 141, 149, 204, 255).

Because the uncased pipe line constituted an obstruction in the new highway rights of way (R. 86, 104, 115), the Highway Department required that Petitioner's pipe line be cased under those portions of Petitioner's private easements to be crossed by the new highway facilities, and requested that Petitioner install the required casing (R. 87, 95, 112, 126, 190-194, 214-217, 218). Petitioner refused to do the casing without assurance that it would be reimbursed for the cost of the work (R. 15, 20, 197, 219). The Highway Department officials considered the matter of Petitioner's compensation for casing its pipe line under the new highway rights of way to be a part of Respondent's responsibility to acquire the rights of way as above set out (R. 83-87, 101-105, 115, 125-127). Therefore, when Petitioner raised the question of compensation, the officials referred it to Respondent (R. 117-118, 126-127, 198).

The Highway Department would not begin construction until the casing was done (R. 127). So, Respondent then undertook to have Petitioner's line cased under the new highway rights of way and requested that Petitioner do the work without compensation (R. 16, 21, 130-131, 141, 180-182, 220, 226). In this connection, Respondent's County Judge admitted that the County was the proper agency to have Petitioner's pipe line cased (R. 181) and that Respond-

ent had handled such matters in connection with these and other highway construction projects (R. 132, 136, 181, 182).

Petitioner again refused to case the portions of its pipe line in its private easements to be crossed by the new highway rights of way without compensation (R. 16, 21, 142, 202, 227). Because of Petitioner's refusal to install casing under the new rights of way Respondent contracted to reimburse Petitioner for the work under both projects. With respect to Highway 69, Respondent's Commissioners' Court adopted an order on May 23, 1955, providing:

> "Trunkline Gas Company is authorized to extend the casing of their pipelines across U. S. Highway Sixty-nine at County expense . . ." (R. 149)

And with respect to Highway 418, the Commissioners' Court adopted an order on May 27, 1957, providing:

> "Hardin County will pay, according to law all legal claims fixed against it, for the casing, lowering and relocation of all pipe lines in existing and proposed Farm-to-Market and State Highway rights-of-way, when not otherwise compensated." (R. 228)

However, Respondent made no effort in either instance to purchase or condemn Petitioner's private easements or any right or interest therein.

In express reliance upon the orders of the Commissioners' Court and the correspondence relating thereto (R. 205-207, 227-230), which set forth Respondent's contracts to reimburse, Petitioner did the casing requested (R. 17, 22). The new highway facilities were then constructed. But notwithstanding its agreements, Respondent refused to pay Petitioner's claims for the cost of casing, and Petitioner filed this suit for breach of contract and for compensation for

the taking and damaging of its property in violation of both the United States and Texas Constitutions.

Both parties filed motions for summary judgment (R. 12, 27). The District Court granted Petitioner's motion and rendered judgment for Petitioner (R. 35-36) upon findings of fact and conclusions of law (R. 64-71). The Court of Appeals held Petitioner's contracts with Respondent invalid, reversed the District Court's judgment, and remanded the cause with directions that judgment be entered for Respondent (R. 238-244). Petitioner timely filed a petition for rehearing (R. 247), which was overruled on February 27, 1963 (R. 275).

Petitioner timely filed its petition for a writ of certiorari. While such petition was pending, the Texas Legislature passed Acts 1963, 58th Legislature, Chapter 240, page 654 (Vernon's Ann. Civ. Stats., Article 6674n-3), which provides:

> "Section 1. In the acquisition of all highway rights-of-way by or for the Texas Highway Department, the cost of relocating or adjusting utility facilities which cost may be eligible under the law is hereby *declared to be an expense and cost of right-of-way acquisition.*
>
> "Sec. 2. *All contracts or agreements heretofore made and entered into by the various counties and cities for the purposes stated above are hereby ratified and validated.*
>
> "Sec. 3. All laws or parts of laws in conflict herewith are hereby repealed to the extent of such conflict.
>
> "Sec. 4. *The fact that the provisions of this Act are necessary in order to clarify existing law* as to the proper classification of costs incurred for the relocation or adjustment of utility facilities as a part of the acquisi-

> tion of right-of-way creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and said Rule is hereby suspended; and that this Act shall take effect and be in force from and after its passage, and it is so enacted." (Emphasis supplied.)

Because of this new statute, this Court vacated the judgment of the Court of Appeals and remanded the case to the Court of Appeals. 375 U.S. 8.

On April 15, 1964, the Court of Appeals held the new Texas statute unconstitutional, disregarded the Texas Legislature's construction of the previously existing Texas law, and re-entered its judgment reversing that of the District Court. (Supp. R. 85-97)

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with the applicable law of Texas on two important questions of Texas law which affect all of the 254 counties of the State traversed by large numbers of pipe lines across which State highways are and will be constructed:

(i) The constitutionality of the 1963 statute; and

(ii) The power of the counties to pay for adjustments of pipe lines in private easements required for highway construction.

a. The decision of the Court of Appeals conflicts with the Texas law on the constitutionality of the 1963 Texas statute validating the contracts in this case.

The Court of Appeals in its opinion of April 15, 1964 (Supp. R. 85, 96, Appendix A, pp. 32-41), held the curative

section of the 1963 statute, which ratified Petitioner's contracts with Respondent, unconstitutional under Sections 44, 51, 52, 53 and 55 of Article III of the Texas Constitution. This holding is in direct conflict with the applicable Texas decisions on what the court correctly describes as *"constitutional questions of great moment and import."* (p. 33, *infra*).

Section 53 is the *only* section of Article III of the Texas Constitution applicable to this case. That section provides that the Legislature shall have no power to authorize the payment of a claim against a county or municipality made without authority of law. However, unlike Section 44 which applies to claims against the State, not a county or municipality, Section 53 does not require that the agreements involved have been authorized by a *pre-existing* law. The Texas courts have uniformly held that the required authority of law may be supplied by validating or curative statutes. Therefore, Petitioner's contracts with Respondent, even if initially invalid, have been validated and should be enforced. The following Texas decisions so hold:

Duncan v. *City of Waco*, 81 S.W. 2d 57 (Tex. Sup., 1935) (city bonds, tax levies and annexation ordinance);

Western Union Telegraph Co. v. *Wichita County Water Improvement Dist., No. 1*, 30 S.W. 2d 301 (Tex. Com. App., 1930) (organization, taxes and bonds of water district);

Twing v. *Rhodes*, 16 S.W. 2d 258 (Tex. Sup., 1929) (county road bonds);

Matlock v. *Dallas County Arcadia Fresh Water Supply Dist. No. 1*, 12 S.W. 2d 181 (Tex. Sup., 1929) (creation, bonds and tax levies of water district);

Anderson County Road District No. 8 v. *Pollard*, 296 S.W. 1062 (Tex. Sup., 1927) (county road district bonds);

Tom Green County v. *Moody*, 289 S.W. 381 (Tex. Sup., 1926) (county road bonds);

Nolan County v. *State*, 17 S.W. 823 (Tex. Sup., 1891) (county road bonds);

Morris & Cummings v. *State*, 62 Tex. 728 (1884) (transfer of state franchise by city to private firm);

Garey v. *The City of Galveston*, 42 Tex. 627 (1875) (city bonds);

Brown v. *Truscott Independent School District*, 34 S.W. 2d 837 (Tex. Com. App., 1931);

Henson v. *Commissioners' Court of Henderson County*, 56 S.W. 2d 240 (Tex. Civ. App., 1932, error refused) (county road bonds);

Caldwell v. *Crosser*, 20 S.W. 2d 822 (Tex. Civ. App., 1928, error refused) (county road bonds).

Thus, in *Henson* v. *Commissioners' Court of Henderson County, supra*, where the county's road bonds had been void when issued but had been validated by subsequent curative statutes, the Appellant contended and the court held as follows:

> "Appellant contends, however, that the validating acts are repugnant to section 53, art. 3, of our Constitution, reading: . . .
>
> "This section, in our opinion, has no application to the subject under consideration because of the effect that must be given the validating acts; therefore, without further discussion, we overrule appellant's contention in this respect."

As noted, the Texas Supreme Court refused outright the application for writ of error in the *Henson* case, thus

holding the Court of Civil Appeals correctly declared the law and reached the correct judgment.[1]

The only requirement set forth under the cases cited above is that, at the time of the validating statute, the Legislature have the initial power to authorize the debt or contract validated. In this case that requirement has been met. *Barrington* v. *Cokinos,* 338 S.W. 2d 133 (Tex. Sup., 1960); *Robbins* v. *Limestone County,* 268 S.W. 915, 919 (Tex. Sup., 1925). In fact, in its first opinion (R. 238-243), even the Court of Appeals recognized that such agreements by a county could be authorized by the Legislature when it reviewed the history of the development of the Texas laws relating to State Highways.

The primary error of the Court of Appeals in its second opinion was to equate Section 53, which applies to counties, with Section 44 of Article III of the Texas Constitution. Section 44 prohibits payment of any claim out of the treasury of the *State* (not a county) "when the same shall not have been provided for by *pre-existing* law." The word "pre-existing" does not appear in Section 53, so retroactive validating acts are effective to authorize contracts and debts of counties under Section 53. The cases cited above so hold. Where a claim is made against the State, on the other hand, it is settled that it must have been authorized by a pre-existing law because of the express language of Section 44. And it is upon cases involving claims against the State that the Court of Appeals relies in its second opinion. *State* v. *Ragland Clinic-Hospital,* 159 S.W. 2d 105 (Tex. Sup., 1942); *Ft. Worth Cavalry Club, Inc.* v. *Sheppard,* 83 S.W. 2d 660 (Tex. Sup., 1935); *Corsicana Cotton Mills, Inc.* v. *Sheppard,* 71 S.W. 2d 247 (Tex. Sup., 1934); *Nichols*

[1] Acts 1927, Reg. Sess., Ch. 144, p. 214; *Hamilton* v. *Empire Gas & Fuel Co.,* 110 S.W. 2d 561, 565 (Tex. Sup., 1937).

v. *State*, 32 S.W. 452 (Tex. Civ. App., 1895, error refused), and other cases cited by the Court of Appeals were suits against the State or State officials. *Anderson County Road District No. 8* v. *Pollard, supra,* upheld a validating statute retroactively curing defects in *county* road bonds, is incorrectly cited by the Court of Appeals, and actually supports Petitioner herein. The other cases cited by the court below likewise fail to support its holding under Section 53.

Having first erroneously held that the 1963 statute violates Section 53 of Article III of the Texas Constitution, the Court of Appeals on the basis of such holding then found that the statute also violates Sections 51, 52 and 55 of Article III. Here also the Court of Appeals is in conflict with the law of Texas.

Sections 51 and 52 prohibit a donation of public money. Here, there was no obligation on the part of Petitioner to do the work on its pipe line.[2] Therefore, there can be no issue of a donation of public funds in requiring Respondent to make the payments required by its contracts. *Barrington* v. *Cokinos,* 338 S.W. 2d 133 (Tex. Sup., 1960); *San Antonio River Authority* v. *Shepperd,* 299 S.W. 2d 920, 928 (Tex. Sup., 1957).

Section 55 prohibits the release of an obligation to the State or a political subdivision. In this case, Petitioner had no obligation to Respondent to be released in the making of the contracts. *Panhandle Eastern Pipe Line Company* v. *State Highway Commission of Kansas,* 294 U.S. 613 (1935); *Department of Highways* v. *United Gas Pipe Line Com-*

---

[2] *Panhandle Eastern Pipe Line Company* v. *State Highway Commission of Kansas,* 294 U.S. 613 (1935); *Department of Highways* v. *United Gas Pipe Line Company,* 258 F. 2d 357, 359 (5 Cir., 1958); *McLennan County* v. *Sinclair Pipe Line Company,* 323 S.W. 2d 471 (Tex. Civ. App., 1959, error refused n.r.e.).

pany, 258 S.W. 2d 357, 359 (5 Cir., 1958); *Magnolia Pipe Line Company* v. *City of Tyler*, 348 S.W. 2d 537 (Tex. Civ. App., 1961, error refused);[3] *McLennan County* v. *Sinclair Pipe Line Company*, 323 S.W. 2d 471 (Tex. Civ. App., 1959, error refused n.r.e.).[3]

After holding the new Texas statute unconstitutional, the Court of Appeals, apparently as an afterthought, to avoid the effects of such holding, states that the new statute does not apply to this case and that it was not intended to apply to this case. These statements are directly contrary to the express language of the statute and the undisputed facts surrounding its enactment. Section 2 of Article 6674n-3 expressly ratified and validated *all* contracts or agreements theretofore made by counties to pay the cost of relocating or adjusting utility facilities in connection with right-of-way acquisition. This clearly includes Respondent's contracts to pay the cost of adjusting Petitioner's lines under the new right-of-way which Respondent acquired across Petitioner's easements in this case.

Moreover, the very timing of the enactment of the new statute and the emergency clause contained in Section 4 leave no doubt that the statute was passed to correct the decision of the Court of Appeals in its first opinion in this case. The first judgment of the Court of Appeals was entered January 9, 1963; Petitioner's petition for rehearing was overruled February 27, 1963; Petitioner then filed its first petition for a writ of certiorari in this Court; and the new statute was introduced. The statute was then passed by the Senate May 6, 1963, by the House May 16, 1963, and approved by the Governor May 30, 1963. Section 4 of the statute provides that the fact that the statute is necessary

---

[3] The pertinent portions of these Texas cases are quoted Appendix C, pp. 58-61 and 51-54, respectively.

to "*clarify existing law*" on cases like this creates an emergency.

Accordingly, the new Texas statute is constitutional; it applies to this case; it has ratified the contracts in this case; and this petition should be granted to review the judgment of the Court of Appeals on the important constitutional questions here presented.

b. The decision of the Court of Appeals conflicts with the Texas law on the power of a county to pay for adjustments of pipe lines in private easements required for highway construction.

Even if the new Texas statute is not to be given effect, the judgment of the Court of Appeals is still wrong under the Texas law. In its first opinion (R. 238-243, Appendix A, pp. 25-30), the court below held that a Texas county has no legal power to compensate for the casing of pipe lines in private easements under rights of way acquired by the county for State highway construction, because same does not come within the statutory authority of the county to acquire such rights of way under Vernon's Ann. Civ. Stats., Articles 6674n and 6674q-4. This construction of the Texas statutes conflicts with that of the Texas Courts of Civil Appeals and that of the State officials charged with the administration and construction of such laws.

In *McLennan County* v. *Sinclair Pipe Line Company*, 323 S.W. 2d 471 (Tex. Civ. App., Waco, 1959, error refused n.r.e.),[4] the county undertook to furnish free of cost to the State, the right of way for State highway construction across the pipe line company's easement. As a part of its acquisition of the right of way for the State, the county requested that the company lower its pipe line which was

[4] For the convenience of the Court, the pertinent portions of this decision are quoted in Appendix C, *infra*, pp. 51-54.

located in the company's private easement. The company refused until the county agreed that the company's right to compensation would not be lost by its proceeding with the work. Then, when the lowering of the line was completed, the company sued the county for its costs. Thus, the facts in that case are not distinguishable from those presented here.

McLennan County, like Respondent and the court below in this case, relied on *Sinclair Pipe Line Company* v. *Archer County*, 147 F. Supp. 650 (N.D. Tex., 1956), affirmed 245 F. 2d 79 (5th Cir., 1957), and asserted that having the pipe line lowered was not within its statutory duty to acquire the right of way. The Court of Civil Appeals in the *McLennan County* case refused to follow the federal courts' holding in the *Archer County* case, that Archer County had no statutory power to pay for pipe line casing. The Texas court held that the pipe line company had not been entitled to compensation in the *Archer County* case only because it had been a volunteer and had waived its rights. There being no waiver in the *McLennan County* case, the Court of Civil Appeals held that McLennan County was required to pay and, therefore, *had legal power to pay* for the lowering of the pipe line as a part of the County's acquisition of the highway right of way for the State. As noted, the Texas Supreme Court approved the result of the *McLennan County* case by refusing to review the decision of the Court of Civil Appeals.

Sinclair Pipe Line Company v. *State*, 322 S.W. 2d 58 (Tex. Civ. App., Fort Worth, 1959),[5] was a condemnation suit brought by Montague County in the name of the State to compel the pipe line company to lower and case its lines.

[5] For the convenience of the Court the pertinent portions of this decision are quoted in Appendix C, *infra*, pp. 54-58.

In that case, also, the Court of Civil Appeals held that the county was required, *and so had the legal power,* to pay compensation for the pipe line adjustments. And, in the most recent Texas case on this question, *Magnolia Pipe Line Company* v. *City of Tyler,* 348 S.W. 2d 537 (Tex. Civ. App., Texarkana, 1961, error refused),[6] the Court of Civil Appeals held that counties and cities in Texas may be required to compensate for adjustments of pipe lines crossed by new streets or highways and, therefore, have power to do so. This holding was approved by the Texas Supreme Court when it refused a writ of error.

These decisions of the Waco, Fort Worth and Texarkana Courts of Civil Appeals were all subsequent to the opinions of the district court and Court of Appeals in *Sinclair Pipe Line Company* v. *Archer County, supra.* Even though the Courts of Civil Appeals are intermediate State appellate courts, the Court of Appeals was obligated to follow their decisions on the question of Texas law presented in this case. *State of California* v. *Taylor,* 353 U.S. 553, 556 (1957); *Fidelity Union Trust Company* v. *Field,* 311 U.S. 169, 177-178 (1940); *Six Companies of California* v. *Joint Highway District No. 13,* 311 U.S. 180, 188 (1940); *West* v. *American Telephone & Telegraph Company,* 311 U.S. 223, 236-237 (1940). Its refusal to follow these Texas decisions was error and places its decision on an important question of Texas law in conflict with the Texas courts.

In addition to disregarding the decisions of the Texas courts, the court below also ignored the long-established construction of the pertinent Texas laws by the State officials charged with the duty of construing and administering them. It is undisputed in the record of this case that the officials of the State Highway Department have

[6] For the convenience of the Court the pertinent portions of this decision are quoted in Appendix C, *infra,* pp. 58-61.

construed the matter of compensation for pipe line adjustments to be a part of the acquisition of highway rights of way by the counties. (R. 83-87, 101-105, 126-127) Even Respondent's County Judge admitted Respondent was the proper agency to have Petitioner's line cased (R. 181).

Moreover, the Attorney General of Texas has consistently held ever since 1940 that a Texas county is authorized and required to compensate for adjustment of pipe lines in private easements which are required to accommodate the construction of highway facilities across existing pipe lines. Opinion No. WW-1090, July 12, 1961; Opinion No. WW-1004, March 6, 1961; Opinion No. WW-125, May 22, 1957; Opinion No. O-2405-A, October 9, 1940.[7]

Under the decisions of this Court and the Texas courts, the Court of Appeals was required not to ignore but to give great weight and respectful consideration to the construction of the Texas laws by the Highway Department and the Attorney General of Texas. *Driscoll* v. *Edison Light & Power Company*, 307 U.S. 104, 115 (1939); *Fox* v. *Standard Oil Company of New Jersey*, 294 U.S. 87, 96 (1935); *The Union Insurance Company* v. *Hoge*, 21 How. 35, 66 (1859); *Farrier* v. *Calvert*, 315 S.W. 2d 40, 42 (Tex. Civ. App., Austin, 1958, error refused n.r.e.); *Gaynor Const. Co., Inc.* v. *Board of Trustees*, 233 S.W. 2d 472, 478 (Tex. Civ. App., El Paso, 1950, error refused); *Trinity Portland Cement Co.* v. *State*, 144 S.W. 2d 329, 335 (Tex. Civ. App., Beaumont, 1940, error refused).

Further, the Court of Appeals refused to consider Vernon's Ann. Civ. Stats., Article 6674c-1, which expressly provides that a Texas county has the authority to make

---

[7] For the convenience of the Court, all of these Opinions of the Attorney General of Texas are set out in full in Appendix D. *infra*, pp. 63-78.

voluntary contributions to the State Highway Department for the "development" of highways in each county, as well as its authority to acquire rights of way for such highways under Articles 6674n and 6674q-4. Article 6674c-1 contains no restrictions on the use to which a county's funds may be put. So, under this statute, a county may certainly furnish the necessary funds to the State Highway Department to compensate for pipe line adjustments required for highway construction. And, it has been determined that what may be done indirectly through the Highway Department, may also be done directly by the county or other political subdivision involved. *Clark* v. *Greer*, 232 S.W. 2d 876 (Tex. Civ. App., Dallas, 1950). However, the Court of Appeals completely disregarded Article 6674c-1 and the construction thereof by the Dallas Court of Civil Appeals in the *Clark* case, which it was obligated to follow.

The Court of Appeals in its first opinion rested its decision, that Respondent has no power to compensate upon Vernon's Ann. Civ. Stats., Articles 6673 and 6674q-4, and upon the opinion of the federal district court in *Sinclair Pipe Line Company* v. *Archer County*, *supra*. Article 6673 was first enacted in 1923[8], and re-enacted in its present form in 1925[9]. Insofar as it prohibits the expenditure of county funds for State highways, Article 6673 has been repealed by the 1929 amendment of Vernon's Ann. Civ. Stats., Article 6674n[10], and by the enactment in 1932 of Vernon's Ann. Civ. Stats., Article 6674q-4[11], providing for the acquisition of rights of way by the counties, and by the adoption in 1947 of Vernon's Ann. Civ. Stats., Article 6674c-1,[12] pro-

[8] Acts 1923, 38th Leg., Ch. 75, Sec. 20, p. 161.

[9] Rev. Stat., 1925, Art. 6673.

[10] Acts 1929, 41st Leg., 3rd C.S., Ch. 10, p. 243.

[11] Acts 1932, 42nd Leg., 3rd C.S., Ch. 13, Sec. 14, p. 17.

[12] Acts 1947, 50th Leg., Ch. 18, p. 25.

viding for county contributions for highway development. Insofar as Article 6674q-4 may have been limited the expenditure of county funds to the acquisition of title to rights of way, it also, of course, was repealed by Article 6674c-1.

In *Sinclair Pipe Line Company* v. *Archer County, supra,* which was decided before any Texas court had written on the question of compensation for pipe line adjustments, the district court relied upon the same statutes cited by the Court of Appeals in this case, and it is clear that neither the district court in that case nor the Court of Appeals in this case correctly followed the legislative history of the statutes they cited. In any event, after the decision of the *Archer County* case, the Texas courts decided the questions here presented to the contrary[13], and the Highway Department officials[14] and the Attorney General of Texas[15] continued to construe the laws as authorizing and requiring Texas counties to pay compensation for pipe line adjustments such as those involved here.

The Court of Appeals simply followed its decision in *Sinclair Pipe Line Company* v. *Archer County, supra.* And, in adhering to the *Archer County* decision, the Court of Appeals completely ignored the intervening decisions of the Texas courts, their construction of the applicable State laws, and the application of such laws by responsible State officials.

Moreover, in enacting the 1963 statute, Vernon's Ann. Civ. Stats., Article 6674n-3, after the first opinion of the

---

[13] *Magnolia Pipe Line Company* v. *City of Tyler, supra; McLennan County* v. *Sinclair Pipe Line Company, supra; Sinclair Pipe Line Company* v. *State, supra* (Appendix C, *infra,* pp. 51-62).

[14] R. 83-87, 101-107, 126-127.

[15] Opinion No. WW-1090, July 12, 1961; Opinion No. WW-1004, March 6, 1961; Opinion No. WW-125, May 22, 1957; all of which are set out in Appendix D, *infra,* pp. 63-75.

Court of Appeals, the Texas Legislature stated that the decision of that Court was in conflict with the legislature's construction of the existing law. But, on remand the court below ignored this persuasive authority. The new statute declares the cost of adjustments in utility facilities, such as the casing of Petitioner's line where same was crossed by the new highway rights of way in this case, to be a cost of the acquisition of highway rights of way by the counties and municipalities. And Section 4 provides that the enactment of the statute is *necessary in order to clarify existing law* as to the proper classification of such cost.

Thus, the new curative statute clearly shows that the Texas Legislature construed the law of Texas to be contrary to the first opinion of the Court below as of the time its judgment was entered. This construction of the Texas law by the Texas Legislature is to be considered persuasive and should be given effect. *United States* v. *Turner Turpentine Co.*, 111 F. 2d 400, 404 (5 Cir., 1940); *Stanford* v. *Butler*, 181 S.W. 2d 269 (Tex. Sup., 1944). In the *Stanford* case, at 181 S.W. 2d 274, the Texas Supreme Court held:

> "There is a very well established rule that where a later act implies a particular construction of an existing law, and particularly where the existing law is ambiguous or its meaning uncertain, interpretation of the prior act by the Legislature as contained in the later act is persuasive when a court is called upon to interpret the prior law."

And in *United States* v. *Turner Turpentine Co., supra*, 111 F. 2d 404, the Fifth Circuit held:

> "As to the 1939 amendment of the Social Security Act, we agree with appellees, that it is to be regarded as interpretative and explanatory of the term as it was used in the original act, and that it is itself a binding

congressional declaration of what was meant by the term 'agricultural labor' as there used."

Under all the authorities cited above, it is clear the judgments and opinions of the Court of Appeals stand in direct conflict with Texas law. Accordingly, it is submitted that the writ of certiorari herein prayed should be granted. Whether a county has power to pay for adjustments of pipe line and utility facilities in private easements, when the adjustments are required for new State highway construction, is a vitally important question to all 254 counties of the State, to the State Highway Department, and to the pipe line and utility companies. This is obvious and requires no argument. The question will arise in virtually every instance of new highway construction in Texas.

c. If the judgment of the Court of Appeals is not reversed, its judgment should be vacated and the case remanded so that a declaration of the law by the State courts may be obtained.

In view of the admitted importance of the questions presented by this case, particularly with respect to the validity of the 1963 statute, Vernon's Ann. Civ. Stats., Article 6674n-3, if this Court should determine not to review the judgment of the Court of Appeals on the merits, this petition should nevertheless be granted. The judgment of the Court of Appeals should then be vacated and the case remanded to the District Court, so that the parties can seek a declaration of the applicable State law from the Texas courts. The Texas courts have not yet considered the 1963 statute, or any question in connection therewith, and it is submitted that none of its provisions should be adjudged invalid under the Texas Constitution by the Federal courts prior to any consideration by the Texas courts.

Texas provides for declaratory judgment actions under its Uniform Declaratory Judgments Act, Vernon's Ann. Civ. Stats. Article 2524-1 (Acts 1943, 48th Leg., p. 265, ch. 164). Petitioner here represents and agrees that it will expeditiously institute and prosecute a declaratory judgment suit in the state courts to obtain a declaration by them of the state law applicable to this case. While this declaration is being sought, the District Court can hold the case and then dispose of it in the light of the judgment of the Texas courts when it has become final.

The procedure here suggested is fully in accord with the actions and holdings of this Court in *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U.S. 134 (1962), and *City of Meridian* v. *Southern Bell Telephone & Telegraph Company*, 358 U.S. 639 (1959).

2. The decision of the Court of Appeals conflicts in principle with the decision of this Court in Panhandle Eastern Pipe Line Company v. State Highway Commission of Kansas, 294 U.S. 613 (1935), and with the decision of the Court of Appeals for the Seventh Circuit in Buckeye Pipe Line Company v. Keating, 229 F. 2d 795 (7th Cir., (1956), cert. den. 352 U.S. 830, as well as those of the Texas courts.

The Court of Appeals in its first opinion held that Respondent's actions, in securing the casing of Petitioner's pipe line under the portions of Petitioner's private easements crossed by the new highway facilities, did not constitute part of Respondent's acquisition of new rights of way. Essential to this holding was a determination that there was no taking or acquisition by Respondent of the pipe line easements which Petitioner had previously pur-

chased from the fee owners of the land. For, as Respondent correctly conceded in its brief in the court below:

> "Taking and acquisition of right-of-way are synonymous."

Respondent then contended that there was no taking of Petitioner's easements and therefore no acquisition for which Respondent had authority to pay. The Court of Appeals necessarily adopted this contention, and in so doing, it placed its decision in conflict with those of this Court and the Seventh Circuit.

In *Panhandle Eastern Pipe Line Company* v. *State Highway Commission of Kansas, supra,* the material facts of which are not distinguishable from those in this case, this Court held (294 U.S. at p. 618):

> "If carried into effect, the challenged order of the Commission would result in *taking* private property for public use. [Citing cases.] *A private right of way is an easement and is land.* [Citing cases.] No compensation was provided for; none was intended to be made. Ordinarily, at least, such *taking* is inhibited by the Fourteenth Amendment." (Emphasis supplied.)

In *Buckeye Pipe Line Company* v. *Keating, supra,* also decided upon similar facts, the Court of Appeals for the Seventh Circuit followed the *Panhandle* case, *supra,* and held (229 F. 2d at p. 798):

> "An *easement* is an interest in real property. It is expressed not in terms of possession or occupancy but in terms of use. Therefore, *the property of the owner of an easement is taken from him* not necessarily when the adverse party occupies the land, but only when he prevents or interferes with the owner's use of the easement. *When that occurs there has been a taking of property from the owner of the easement just as much as if an adverse party had taken real estate which another owned in fee.*" (Emphasis supplied).

Accordingly, the conflict between the decision below and both the *Panhandle* case, *supra*, and the *Buckeye* case, *supra*, is direct and clear.

Moreover, the Texas Courts of Civil Appeals have uniformly followed the *Panhandle* case, *supra*, and the *Buckeye* case, *supra*, and have held a requirement that a pipe line in a private easement be cased constitutes a taking of the easement. *Magnolia Pipe Line Company* v. *City of Tyler, supra; McLennan County* v. *Sinclair Pipe Line Company, supra; Sinclair Pipe Line Company* v. *State, supra* (Appendix C, *infra*, pp. 51-61). Consequently, the decision of the Court of Appeals also conflicts with the laws of Texas on the third question presented as well as the first and second questions.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CECIL N. COOK
1100 Esperson Building
Houston 2, Texas
Counsel for Petitioner, Trunkline Gas Company

Of Counsel:

BUTLER, BINION, RICE & COOK
1100 Esperson Building
Houston 2, Texas

BAKER & DANIELS
810 Fletcher Trust Building
Indianapolis, Indiana

PROOF OF SERVICE

The undersigned counsel for Petitioner, Trunkline Gas Company, a member of the Bar of the Supreme Court of the United States, certifies that copies of the foregoing petition have been served upon Respondent, Hardin County, by depositing same in the United States mail, with first class postage prepaid, addressed to Mr. Wm. Robert Smith, Tower Life Building, San Antonio, Texas, and to Messrs. Sears and Burns and Mr. Robert L. Burns, 1811 C&I Life Building, Houston 2, Texas, attorneys of record for Respondent, this 10th day of July, 1964.

CECIL N. COOK
Counsel for Petitioner

APPENDIX A

Opinions and Judgments of the Court of Appeals

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19592

HARDIN COUNTY,
Appellant,

versus

TRUNKLINE GAS COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

(January 9, 1963)

Before HUTCHESON, WISDOM and GEWIN,
Circuit Judges.

HUTCHESON, Circuit Judge: Alleging both a taking and a damaging under the Texas and Federal Constitutions and breach of a written contract, Trunkline Gas Company, a Delaware Corporation, Appellee, brought suit against Hardin County, a political subdivision of the State of Texas, appellant, to recover the cost of extending the casing enclosing its pipelines crossing two state highways of the State of Texas into adjoining land acquired by appellant for the State of Texas for widening the highways.

Motions for summary judgment were filed by both parties, and the district court, on full findings of fact and conclusions of law, granted the motion of appellee and denied appellant's motion.

Here citing many cases, with particular emphasis on this court's opinion in *Sinclair Pipeline Co* v. *Archer County,* 245 F (2) 79, appellant insists that the judgment was wrong and must be reversed. We agree that this is so for the reasons hereinafter briefly stated and the authorities hereinafter cited.

Basic Texas law dictates that in the absence of a statute authorizing some other agency to contract, the authority to contract on behalf of a county is vested in the Commissioners' Court. *Anderson* v. *Wood,* 152 SW (2) 1084. The contractual authority of a Commissioner's Court is very limited and its limited nature is well stated in *Canales* v. *Laughlin,* 214 SW (2) 451, as follows:

> "The Constitution does not confer on the commissioners courts 'general authority over the county business' and such courts can exercise only such powers as the Constitution itself or the statutes have 'specifically conferred upon them'. See Mills County v. Lampasas County, 90 Tex. 603, 40 SW 403; Anderson v. Wood, 137 Tex. 201, 152 SW (2) 1084. While the commissioners courts have a broad discretion in exercising powers expressly conferred on them, nevertheless the legal basis for any action by any such court must be ultimately found in the Constitution of [sic] the statutes."

Thus, if neither the Constitution nor statutes empower a Commissioners Court to make a particular contract, the contract is null and void. *Nunn-Warren Publishing Co* v. *Hutchinson County,* 45 SW (2) 651; *Aldrich* v. *Dallas*

County, 167 SW (2) 560; *Baldwin* v. *Travis County,* 83 SW 480; and *Dodson* v. *City of Del Rio,* 172 SW (2) 125.

Review of the Texas statutes relating to State highways manifests that a Texas county not only is not authorized to contract to improve, construct or reconstruct a State highway, but is expressly prohibited from expending county funds therefor. The statutes and authorities also prove that the authority of a county is limited to acquiring right-of-way for a State highway.

Prior to the creation of the Texas Highway Department, the power to acquire right-of-way for (by purchase or condemnation), and to construct, improve and reconstruct roads and highways outside of cities was vested exclusively in counties. The basic legislation creating the Texas Highway Department and defining its powers was enacted in 1917, 1923 and 1925. Acts. 1917, 35th Leg., p. 416, Ch. 190; Acts 1923, 38th Leg., p. 155, Ch. 75; Acts 1923, 38th Leg., 2nd C. S., p. 71; Acts 1925, 39th Leg., Ch. 186, p. 458. As thereafter supplemented from time to time, this legislation is found in Articles 6663 to 6674q-14 Vernon's Annotated Civil Statutes.

The Texas decisions, *Robbins* v. *Limestone County,* 268 S.W. 915 (Tex. Sup. 1925); *Nairin* v. *Bean,* 48 SW (2) 584; *Heathman* v. *Singletary,* 12 SW (2) 151; *Gabbert* v. *City of Brownwood,* 176 SW (2) 344; and *State Highway Commission* v. *Humphreys,* 58 SW (2) 144; have held uniformly that these statutes:

(1) require the Department to take over and maintain the State highways;

(2) vested exclusive control of State highways in the Highway Department;

(3) vested exclusive power to improve, construct and reconstruct State highways in the Highway Department;

(4) divested counties of the power to acquire right-of-way for State highways (until 1929); and

(5) operated to transfer the former jurisdiction of counties over State highways to the State Highway Commission.

The language of the statutes admits of no other construction.

Administration of the State Highway Department is vested in the Highway Commission, Article 6663; the Commission is charged with the duty to "formulate plans and policies for the location, construction and maintenance of a comprehensive system of state highways and public roads", Art. 6665; to establish and make public proclamation of all rules and regulations for the conduct of the work of the Department, Art. 6666; and to "investigate and determine the methods of road construction best adapted to the different sections of the state, and [to] "establish standards for the construction and maintenance of highways . . .", Article 6667.

Article 6673 authorizes the Commission

> "To take over and maintain the various state highways in Texas, and the counties through which said highways pass shall be free from any cost, expense or supervision of such highways."

This complete delegation of power over state highways to the Department and prohibition of expenditure of county funds for improvement or construction thereof is repeated in Article 6674q-4 as follows:

> "All further improvement of said State Highway System shall be made under the exclusive and direct control if the State Highway Department

> and with appropriations made by the Legislature out of the State Highway Fund. Surveys, plans and specifications and estimates for all further construction and improvements of said system shall be made, prepared and paid for by the State Highway Department. No further improvement of said system shall be made with the aid of or with any moneys furnished by the counties except the acquisition of right-of-ways which may be furnished by the counties, their subdivisions or defined road districts."

The appellee, recognizing the force and effect of the Sinclair case in this court, undertakes to distinguish it on the ground that in that case there was no agreement to pay on the part of the county, while in this case there was. In so contending, we think the appellee completely fails to appreciate the force and effect of the Texas statutes and decisions cited in and made the basis of the decision of the district court in the Sinclair case,[1] that the county was not obligated, indeed could not legally obligate itself, to pay the sum sued for.

It will be noted that the agreement on which plaintiff sued provided not that Hardin County will pay for the casing, lowering, etc., but that it will pay according to law all legal claims affixed against it, and that, for the reasons shown in the Sinclair and other cases, the claim asserted by plaintiff against the county was not, as it was not in Sinclair's case, a legal claim.

Thus the burden on plaintiff in this case is, as it was in Sinclair's case, to establish the legality of the claim and this, as in Sinclair's case plaintiff was not able to do.

---

[1] Sinclair Pipeline Co. v. Archer County, 147 F. Supp. 650; Affirmed, 245 F (2) 79.

The judgment is therefore Reversed and the cause Remanded with directions to enter judgment for the appellant.

REVERSED and REMANDED.

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit

By /s/ CLARA R. JAMES
Deputy

New Orleans, Louisiana

APR 18 1963

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1962

No. 19,592

D. C. Docket No. 3851 Civil
HARDIN COUNTY,

Appellant,

versus

TRUNKLINE GAS COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

Before Hutcheson, Wisdom and Gewin, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court, with directions to enter judgment for the appellant;

It is further ordered and adjudged that the appellee, Trunkline Gas Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

January 9, 1963

Issued as Mandate: MAR 20 1963

Recoverable Costs:

Docketing Cause, Etc. $25.00

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19592

HARDIN COUNTY,
Appellant,

versus

TRUNKLINE GAS COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

(April 15, 1964.)

Before HUTCHESON, WISDOM and GEWIN, Circuit Judges.

HUTCHESON, Circuit Judge: When this case was here before,[1] the judgment of the district court was reversed and the cause remanded with directions to enter judgment for the appellant.

The Supreme Court, on October 14, 1963, on petition for writ of certiorari to this court, entered the following per curiam:

"The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded

[1] Hardin County v. Trunkline Gas Co., 311 F (2) 882.

to the United States Court of Appeals for the Fifth Circuit, it appearing that the State of Texas has passed a statute in connection with controversies of this kind since the petition for a writ of certiorari was filed in this Court. This order is entered without reaching the merits."

The parties, appellant and appellee in this court, have filed additional briefs. The appellee insists that because of the new statute referred to in the Supreme Court's per curiam, we should recall the mandate, set aside our former judgment of reversal and affirm the judgment of the trial court.

The appellant, invoking constitutional provisions, Sections 44, 51, 52 and 53 of Article III of the Texas Constitution, insists: that these provisions, manifesting an intent of the framers of the Constitution to severely limit and circumscribe the powers of the Legislature to enact curative statutes, in effect prohibit and prevent the ratification of the alleged contracts in this case; and that we should reaffirm our former judgment. We agree that this is so.

Unlike the questions argued when the case was decided before, the questions now presented are, as they were in *Constantin* v. *Smith*, 57 F(2) 227, constitutional questions of great moment and import, and, since these constitutional provisions, like those discussed in the case of *Constantin* v. *Smith*, were written into the Texas Constitution of 1876, at the end, and because of, an era of spoilation and abuse of power in the reconstruction period under the rule of carpetbaggers and scalawags and their henchmen and minions, these constitutional safeguards, against Legislative usurpation of power, must be given full and vigorous support and application, as they were in *Constantin* v.

Smith, supra, at p. 237, affirmed *Sterling* v. *Constantin,* 287 U.S. 378.

The Texas cases, in uniformly declaring and enforcing the constitutional rule applicable to curative and validating statutes, have declared that the rule is that

> ". . . What the Legislature could have authorized in the first instance it can ratify, *if at the time of ratification it has the initial authority to authorize." Anderson County Road Dist.* v. *Pollard,* 296 SW 1062, (Tex. Sup. 1927) (Emphasis supplied)

Thus the contention of the appellee that the only qualification of the validity of a retroactive validating statute is that the action or contract validated by the curative statute must be one which the Legislature could have *originally* authorized, must be rejected as contrary to the established law of Texas. This being so, our original opinion in this case, that the questioned contracts of the county were unenforceable because appellant not only did not have statutory powers to make the contracts, but was prohibited by statute from so contracting, makes it clear: that the so-called validating statute is without authority in law, Texas Constitution Sec. 53, Art. III; and that any attempt to require payment of funds under such contracts constitutes an unconstitutional donation of public funds. Texas Constitution Sec. 52, Art. III.

Section 53 provides that the Legislature shall have no power to authorize payment of any claim created against any county under any agreement and contract made without authority of law.

Section 52 prohibits the Legislature from authorizing any county "to grant public money or thing of value" to any individual or corporation. To construe Sec. 2 of the Act of 1963 as imposing a retroactive obligation on appel-

lant to pay appellee's claim under the void contracts would authorize payment of a claim created under a contract made without authority of law, and thus constitute a grant of public money to a corporation.

To be properly understood, Sections 52 and 53 must be considered with Sections 44, 51, and 55 of Article III.[2] Thus, as was the case in *Sterling* v. *Constantin,* where the constitutional limitations invoked were imposed upon the Executive, while here the invoked constitutional limitations are imposed upon the Legislative, it must be held here that all attempts by the Legislative to exercise powers claimed but not possessed is overriden by the invoked constitutional provisions. In the face thereof, it must be held that construed as an attempt to ratify the alleged contracts between appellant and appellee Sec. 2 of the Act of 1963, the so-called validation statute, on which appellee relies, is an attempt to authorize the payment of a claim against the county under a contract made without authority of law, and is therefore constitutionally invalid. *Anderson County Road Dist.* v. *Pollard,* 296 SW 1062 (Tex. Sup. 1927).[3]

In the *Fort Worth Cavalry Club* case, the Adjutant General contracted to lease certain premises from the club for a period of five years beginning on Sept. 1, 1931. Rentals for the months of Sept., 1931, through Feb., 1932, were paid by warrants drawn on an available appropria-

---

[2] Vernon's Constitution of the State of Texas, Annotated, pp. 19, 24, 28, and 30.

[3] See also State v. Ragland Clinic-Hospital, 159 SW(2) 105 (Tex. Sup. 1942); Ft. Worth Cavalry Club, Inc. v. Sheppard, 83 SW(2) 660 Tex. Sup. 1935); Corsicana Cotton Mills, Inc. v. Sheppard, 71 SW(2) 247 (Tex. Sup. 1934); Empire Gas & Fuel Co. v. State, 47 SW(2) 265 (Tex. Sup. 1932); State v. Wilson, 9 SW 155 (Tex. Sup. 1888); Ussery v. City of Laredo, 65 Tex. 406 (1886); State v. Steck Co., 236 SW(2) 866 (Tex. Civ. App. 1951, error ref.); State v. Haldeman, 163 SW 1020 (Tex. Civ. App. 1913 error ref.); Shelby County v. Gibson, 44 SW 302 (Tex. Civ. App. 1898, error ref.); Nichols v. State, 32 SW 452 (Tex. Civ. App. 1895, error ref.); Matkins v. State, 123 SW(2) 953 (Tex. Civ. App. 1939, error dism.) Cf. Smith v. Constantin, supra.

tion. A declaration of martial law in certain East Texas counties[4] created unforeseen expenses which exhausted the appropriation on Feb. 29, 1932. The state occupied the premises for the months of March through August, 1932, and during these months the Governor and Adjutant General, in payment of the rent, issued certificates in lieu of treasury warrants. In 1953, the Legislature passed an act appropriating money to pay the past due rent "and authorizing payment of said rent". Acts 1933, 43rd Leg., p. 336, Ch. 132. Upon the comptroller's refusal, the club sought a writ of mandamus to compel the comptroller to issue warrants out of this appropriation.

After extensive review of Texas cases and statutes, the Supreme Court denied the mandamus, holding: that the Adjutant General did not have statutory authority to make the lease contract; that the action of the Adjutant General and Governor did not ratify the contract; *that the appropriation act violated Sec 44, Art. III,* because the club did not have legal claim against the State at the time the appropriation was made; and that neither the appropriation act nor any other act of the State ratified the contract.

Unequivocally, the court holds that the act appropriating money to pay the past due rent "and authorizing payment of said rent" did not ratify the lease contract because the contract was made without authority of law. If the ultimate in ratification of a void contract, an act appropriating money to pay therefor, is not within the power of the Legislature, ratification cannot be accomplished by use of the words "validate and ratify". Appellee urges that the declaration that certain contracts "are hereby ratified and validated" authorizes appellant to make payment under the contracts condemned by this court. In effect, this con-

[4] Cf. Smith v. Constantin, supra.

tends that, although the Legislature could not enact a statute authorizing and directing appellant to pay the sums claimed under the contract, it has the power to achieve this result by use of the magic words "validate and ratify".

Review of a few of the decisions cited in note 3, *supra*, manifests the consistency with which the Texas courts have applied the rule of Ft. Worth Cavalry Club, Inc., that the Legislature is without power to authorize payment under a contract made without authority of law. In *Corsicana Cotton Mills, supra,* the relator, through an erroneous construction of law, voluntarily paid franchise taxes to the State for several years. Thereafter, the Legislature appropriated funds to reimburse the relator. The comptroller refused to issue a warrant, and relator sought an original mandamus. The court denied the mandamus, holding that relator was a volunteer in paying the taxes, and

> "It therefore had no legal claim against the State for their repayment at the time this appropriation was made. Since the appropriation at the time it was made, was not supported by legal claim, it was and is unconstitutional and void."
>
> • • •
>
> "The constitutional provision under discussion here (Sec. 44) expressly prohibits the Legislature from making any appropriation when the same shall not have been provided for by pre-existing law. If the Legislature violates this provision, it is not only the right, but the duty of this court to declare such item of appropriation null and void."

Recognizing that the Legislature cannot appropriate county funds, as it does State funds, Sec. 53, instead of prohibiting appropriation, prohibits the Legislature from

authorizing payment of county funds. The result is the same. The Legislature cannot, by curative statute, appropriation, or otherwise, authorize payment under a contract made without authority of law. All the cases cited in note 1, *supra,* also so hold.

Nichols v. *State,* 32 S.W. 452 (Tex. Civ. Appr. 1895, error ref.) holds that a contract made without authority of law cannot be ratified. Under an act authorizing certain commissioners to award a contract for construction of the General Land Office building at a cost not to exceed $40,000.00, the commissioners awarded Nichols a contract for erection of the building for $39,663.00. After the work had progressed to some extent, the commissioners made a subsequent contract increasing the cost about $12,000.00. The Legislature granted the contractor authority to bring suit "to ascertain and fix the amount" due for the construction of the building. The trial court awarded the sum of $337.00, the difference between the maximum of $40,000.00 and the original contract price of $39,663.00. Upon the contractor's appeal, the court held that Sec. 44 prevented recovery on the additional contract. The court held:

> "We are of opinion that the claim of appellant is not based upon any pre-existing law, and that such claim falls within the spirit and meaning of the prohibition contained in the latter part of the section of the constitution quoted. The apparent purpose of this provision of the constitution was to relieve the state from liability for all claims that were not authorized by a pre-existing law, *and to prohibit the Legislature from paying them.* State v. Wilson, 71 Tex. 291, 9 S.W. 155." (emphasis supplied)

The parallel of these facts and holdings to the instant case is manifest. The commissioners were prohibited from contracting for a sum exceeding $40,000.

This court held that appellant not only was without statutory authority to expend funds for construction of a state highway, but was expressly prohibited from doing so by Art. 6674q-4.

In *Nichols* v. *State,* 32 S.W. 452, the court held that there can be no ratification in the face of a constitutional provision declaring a claim void and prohibiting a grant of money "by appropriation or otherwise". The contracts under consideration made without authority of law, are void, and the Legislature is without power, by the express prohibition of Sec. 53 from validating a contract made without authority of law. See also *State* v. *Haldeman,* 163 S.W. 1020 (Tex. Civ. App. 1913, error ref.).

The complete force of the prohibition against paying a claim "when the same shall not have been provided for by pre-existing law" is evidenced by the holdings in *State* v. *Ragland Clinic-Hospital,* 159 S.W. 2d 105 (Tex. Sup. 1942) and *State* v. *Steck Co.,* 236 S.W. 2d 866 (Tex. Civ. App. 1951, error ref.).

The contract relied upon by appellee having been made without authority of law, as we originally held and now hold, the Legislature has no power to authorize payment of any alleged obligation thereunder.

Sec. 55, Art. III is the converse of Sections 44 and 53. These two sections prohibit the *payment of any claim* which is not a legal obligation, while Sec. 55 prohibits *the release of any obligation* to the State or political subdivision. The strict judicial construction of Sec. 55 proves that the Legislature can neither release an obligation to a county or create an obligation against a county under a contract made without authority of law. *State* v. *City of Austin,* 331 S.W. 2d 737 (Tex. Sup. 1960); *Empire Gas & Fuel Co.* v. *State,* 47 S.W. 2d 265 (Tex. Sup. 1932);

and *Ollivier* v. *City of Houston,* 54 S.W. 943 (Tex. App. 1900).

Thus, under Texas decisions it is the law that after the occurrence of events, which under the law then existing do not create an obligation, ***the Legislature can no more create the obligation by validating act than it can release an obligation arising from past events.*** Appellee's construction of the Act of 1963 is a clear attempt to compel payment of a claim created against a county under a contract "made without authority of law".

Sections 52 and 53, depriving the Legislature of the power to authorize a donation of funds of political subdivisions and the payment of claims created under contracts made without authority of law, respectively, by their very terms, do not become effective until after the occurrence of the events giving rise to a controversy. For example, it is only after a county has made a contract without authority of law that the prohibition applies. In other words, these constitutional provisions intervene between the time of county action and the time of attempted action by the Legislature in the same manner as would a new constitutional provision depriving the Legislature of the power to initially authorize the contract. In the latter event, it is clear that the Legislature is deprived of the power of ratification, and there can be no distinction between an intervening constitutional provision depriving the Legislature of the power to initially authorize the act and one depriving the Legislature of the power to ratify. *In either event, the power to ratify is destroyed.*

In addition to its contention that the Legislature could not validate and authorize the payment of funds in question here, appellant insists that the Legislative Act does not in terms or in effect purport to do so. The act is general and neither expressly nor impliedly deals with the situation

involved in this case, and we are of the view that, since the statute would be so clearly unconstitutional if construed as an attempt to validate the questioned contracts, it is our duty to construe the statute as not intending to effect an unconstitutional result.

Of the opinion that our original judgment, reversing the judgment of the district court was correct and that we should re-enter it, we here and now reaffirm and re-enter it. The judgment appealed from is therefore REVERSED and the cause is REMANDED with directions to enter judgment for the appellant.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19592

HARDIN COUNTY,

Appellant,

versus

TRUNKLINE GAS COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

Before HUTCHESON, WISDOM and GEWIN, Circuit Judges.

JUDGMENT

WHEREAS the Supreme Court of the United States on October 14, 1963, vacated the judgment of this Court and remanded the case to this Court;

ON FURTHER CONSIDERATION, It is now here ordered and adjudged by this Court that the original judgment of this Court, reversing the judgment of the District Court is reaffirmed and re-entered; and that this cause be, and it is hereby, remanded to the said District Court with directions to enter judgment for the appellant;

It is further ordered and adjudged by this Court that the appellee, Trunkline Gas Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

April 15, 1964

Issued as Mandate:

May 7, 1964

Recoverable Costs:
Docketing cause, etc. $25.00

APPENDIX B

Constitutional Provisions

Tex. Const. Art. III, Sec. 44 (Revised Civil Statutes of Texas of 1925, Vol. I, p. XXVI)

The Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors, not provided for in this Constitution, but shall not grant extra compensation to any officer, agent, servant, or public contractors, after such public service shall have been performed or contract entered into, for the performance of the same; nor grant, by appropriation or otherwise, any amount of money out of the Treasury of the State, to any individual, on a claim, real or pretended, when the same shall not have been provided for by pre-existing law; nor employ any one in the name of the State, unless authorized by pre-existing law.

Tex. Const. Art. III, Sec. 51 (Revised Civil Statutes of Texas of 1925, Vol. I, p. XVII)

The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever; provided, however, the Legislature may grant aid to indigent and disabled Confederate soldiers and sailors under such regulations and limitations as may be deemed by the Legislature as expedient, and to their widows in indigent circumstances under such regulations and limitations as may be deemed by the Legislature as expedient; to indigent and disabled soldiers, who, under special laws of the State of Texas, during the war between the States, served in organizations for the protection of the frontier against Indian raids or Mexican marauders, and to indigent and disabled soldiers of the

militia who were in active service during the war between the States, and to the widows of such soldiers who are in indigent circumstances, and who are or may be eligible to receive aid under such regulations and limitations as may be deemed by the Legislature as expedient; and also grant for the establishment and maintenance of a home for said soldiers and sailors, their wives and widows and women who aided in the Confederacy, under such regulations and limitations as may be provided for by law; provided the Legislature may provide for husband and wife to remain together in the home. There is hereby levied in addition to all other taxes heretofore permitted by the Constitution of Texas, a State ad valorem tax on property of seven ($.07) cents on the one hundred ($100) dollars valuation for the purpose of creating a special fund for the payment of pensions for services in the Confederate army and navy, frontier organizations and the militia of the State of Texas, and for the widows of such soldiers serving in said armies, navies, organizations or militia; provided that the Legislature may reduce the tax rate herein levied, and provided further, that the provisions of this section shall not be construted so as to prevent the grant of aid in cases of public calamity.

Tex. Const. Art. III, Sec. 52 (Revised Civil Statutes of Texas of 1925, Vol. I, p. XXVIII)

The Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company; provided, however, that under legislative provision any county, any political subdivision of a county, any number of adjoining counties, or any political subdivision of the State, or any

defined districts now or hereafter to be described and defined within the State of Texas, and which may or may not include, towns, villages or municipal corporations, upon a vote of a two thirds majority of the residents property taxpayers voting thereon who are qualified electors of such district or territory to be affected thereby, in addition to all other debts, may issue bonds or otherwise lend its credit in any amount not to exceed one-fourth of the assessed valuation of the real property of such district or territory; except that the total bonded indebtedness of any city or town shall never exceed the limits imposed by other provisions of this Constitution, and levy and collect such taxes to pay the interest thereon and provide a sinking fund for the redemption thereof, as the Legislature may authorize, and in such manner as it may authorize the same, for the following purpose to wit:

(a) The improvement of rivers, creeks, and streams to prevent overflows, and to permit of navigation thereof, or irrigation thereof, or in aid of such purposes.

(b) The construction and maintenance of pools, lakes, reservoirs, dams, canals and waterways for the purposes of irrigation, drainage or navigation, or in aid thereof.

(c) The Construction, Maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof.

Tex. Const. Art. III, Sec. 53 (Revised Civil Statutes of Texas of 1925 Vol. I, p. XXVIII)

The Legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and perfomed in whole or in part; nor pay, nor authorize the payment

of, any claim created against any county or municipality of the State, under any agreement or contract, made without authority of law.

Tex. Const. Art. III, Sec. 55 (Revised Civil Statutes of Texas of 1925, Vol. I, p. XXVIII)

The Legislature shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual, to this State or to any county or defined subdivision thereof, or other municipal corporation therein, except delinquent taxes which have been due for a period of at least ten years.

Statutes

Vernon's Ann. Civ. Stats., Article 6673 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1900, Art. 6673), is as follows:

> "The Commission is authorized to take over and maintain the various State Highways in Texas, and the counties through which said highways pass shall be free from any cost, expense or supervision of such highways. The Commission shall use the automobile registration fees in the State Highway Fund for the maintenance of such highways, and shall divert the same to no other use unless the Commission shall be without sufficient funds from other sources to meet Federal aid to roads in Texas, and in such case the Commission is authorized by resolution to transfer a sufficient amount from such fund to match said Federal aid. Acts 1923, p. 161; Acts 2nd C.S. 1923, p. 71."

Vernon's Ann. Civ. Stats., Article 6674c-1 (Texas Acts 1947, 50th Leg., Ch. 18, p. 25), is as follows:

> "Any county or political sub-division of any county in this state, acting through its governing agency, may make, and the State Highway Commission, in its dis-

cretion, may accept, voluntary contributions of available funds from such county or political sub-division, for expenditure by the State Highway Commission in the development of the public roads of such county, or political sub-division. Acts 1947, 50th Leg., p. 25, ch. 18, § 1."

Vernon's Ann. Civ. Stat., Article 6674n (Texas Acts 1955, 54th Leg., Ch. 423, p. 1128), is as follows:

"Whenever, in the judgment of the State Highway Commission, the use or acquisition of any land for road, right of way purposes, timber, earth, stone, gravel or other material is necessary or convenient to any road to be contructed, reconstructed, maintained, widened, straightened or lengthened, or land not exceeding one hundred (100) feet in width for stream bed diversion in connection with the locating, relocating or construction of a designated State Highway by the State Highway Commission, the same may be acquired by purchase or condemnation by the County Commissioners Court. This authority includes the power to exercise the right of eminent domain by any County Commissioners Court within the boundaries of a municipality with the prior consent of the governing body of such municipality. Provided that the county in which the State highway is located may pay for same out of the County Road and Bridge Fund, or any available county funds.

"Any Commissioners Court is hereby authorized to secure by purchase or by condemnation on behalf of the State of Texas, any new or wider right of way or land not exceeding one hundred (100) feet in width for stream bed diversion in connection with the locating, relocating or construction of a designated State Highway, or land or lands for material or borrow pits, to be used in the construction, reconstruction or maintenance of State Highways and to pay for the same out of the County Road and Bridge Fund, or out of any special road funds or any available county funds. This authority includes the power to exercise the right of

eminent domain by any County Commissioners Court within the boundaries of a municipality with the prior consent of the governing body of such municipality. The State Highway Commission shall be charged with the duty of furnishing to the County Commissioners Court the plats or field notes of such right of way or land and the description of such materials as may be required, after which the Commissioners Court may, and is hereby authorized to purchase or condemn the same, with title to the State of Texas, in accordance with such field notes. Provided that in the event of condemnation by the County the procedure shall be the same as that set out in Title 52, Articles 3264 to 3271, inclusive, Revised Civil Statutes of Texas, of 1925. Provided that if the County Commissioners Court of any County in which such right of way is, in the judgment of the State Highway Commission, necessary for the construction of a part of a designated State Highway shall fail or refuse to secure by purchase or by condemnation for or on behalf of the State of Texas, such right of way or part thereof, immediately and as speedily as possible, under said Title 52, Articles 3264 to 3271, inclusive, Revised Civil Statutes of Texas, of 1925, after being served with a copy of an order of the State Highway Commission identifying by field notes, the part of the Highway necessary for the construction of such designated State Highway and requesting such County Commissioners Court to secure same, then and in such event and within ten (10) days after the service of such notice, said State Highway Commission shall direct the Attorney General of Texas, to institute condemnation proceedings in the name of the State of Texas, for the purpose of securing such right of way. Such condemnation proceedings shall be instituted by the County or District Attorney of the County in which the land is situated and the venue of such proceedings shall be in the county in which the land is situated and jurisdiction and authority to appoint three (3) disinterested freeholders of such County as Commissioners is hereby conferred upon the County Judge of such County in which the land is situated and otherwise such con-

demnation shall be according to the provisions of said Title 52, Articles 3264 to 3271, inclusive, Revised Civil Statutes of Texas, 1925, as amended. Acts 1925, 39th Leg., ch. 186, p. 458, § 14; Acts 1929, 31st Leg., 32d C.S. p. 243, ch. 10; Acts 1930, 41st Leg., 5th C.S., p. 243, ch. 79; Acts 1933, 43rd Leg., p. 622, ch. 207; Acts 1935, 44th Leg., p. 485, ch. 199, § 1; Acts 1955, 54th Leg., p. 1128, ch. 423, § 1."

Vernon's Ann. Civ. Stats., Article 6674n-3 (Texas Acts 1963, 58th Leg., ch. 240, p. 654) is as follows:

"Section 1. In the acquisition of all highway rights-of-way by or for the Texas Highway Department, the cost of relocating or adjusting utility facilities which cost may be eligible under the law is hereby declared to be an expense and cost of right-of-way acquisition.

"Sec. 2. All contracts or agreements heretofore made and entered into by the various counties and cities for the purposes stated above are hereby ratified and validated.

"Sec. 3. All laws or parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

"Sec. 4. The fact that the provisions of this Act are necessary in order to clarify existing law as to the proper classification of costs incurred for the relocation or adjustment of utility facilities as a part of the acquisition of right-of-way creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and said Rule is hereby suspended; and that this Act shall take effect and be in force from and after its passage, and it is so enacted."

Vernon's Ann. Civ. Stats., Article 6674q-4 (Texas Acts 1943, 48th Leg., ch. 324, Sec. 3, p. 496), is as follows:

"All further improvements of said State Highway System shall be made under the exclusive and direct

control of the State Highway Department and with appropriations made by the Legislature out of the State Highway Fund. Surveys, plans and specifications and estimates for all further construction and improvement of said system shall be made, prepared and paid for by the State Highway Department. No further improvement of said system shall be made with the aid of or with any moneys furnished by the counties except the acquisition of right-of-ways which may be furnished by the counties, their subdivisions or defined road districts. But this shall in nowise affect the carrying out of any binding contracts now existing between the State Highway Department and the Commissioners Court of any county, for such county, or for any defined road district. In the development of the System of State Highways and the maintenance thereof, the State Highway Commission shall from funds available to the State Highway Department, provide:

"(a) For the efficient maintenance of all highways comprising the State system.

"(b) For the construction, in co-operation with the Federal Government to the extent of Federal Aid to the state, of highways of durable type of the greatest public necessity.

"(c) For the construction of highways, perfecting and extending a correlated system of State Highways, independently from state funds. Acts 1932, 42nd Leg., 3rd C.S., p. 15, ch. 13, § 3, (formerly § 4,), renumbered and amended Acts 1939, 46th Leg., p. 582, § 1; Acts 1941, 47th Leg., 1st C.S., p. 2, ch. 2, § 1; Acts 1943, 48th Leg., p. 494, ch. 324, § 1."

APPENDIX C

Conflicting Texas Decisions

McLennan County v. Sinclair Pipe Line Company, 323 S.W. 2d 471, 472-474 (Tex. Civ. App., Waco, 1959, error refused n.r.e.)

"This is a suit by Sinclair Pipe Line Company against McLennan County to recover from McLennan County the cost of lowering its pipeline at the request of the Commissioners Court of McLennan County in order that Farm to Market Road 1860 might be constructed across the pipeline as it lay on the W. F. Neale farm in McLennan County, Texas. The Trial Court granted judgment for Sinclair Pipe Line Company on its motion for summary judgment.

"McLennan County appeals, contending:

(1) The Trial Court erred because, under the facts, there is *no statutory duty*, contractual obligation, tort obligation, nor *other legal obligation* on McLennan County to pay Sinclair anything."[1]

• • •

"We revert to McLennan County's 1st contention. The facts are undisputed, and reflect that in 1947 Sinclair acquired a right of way easement from Neale for its pipeline to cross his farm in McLennan County, and built its pipeline on such easement. In 1954 the Texas Highway Department called on McLennan County to furnish 'the required right of way' for Farm to Market Road 1860. McLennan County, in 1956, by order of the Commissioners Court, agreed 'to furnish all required right of way free of cost to the State' for such road. Later in 1956 McLennan County notified Sinclair that the proposed road was to cross Sinclair's ease-

[1] Emphasis has been supplied in the appendix by the writer of the Petition except where the contrary is expressly noted.

ment and pipeline as it lay on the Neale farm in McLennan County. McLennan County requested that Sinclair lower its pipeline in order that this new section of road might be constructed. Sinclair refused to lower its pipeline until McLennan County should agree to pay compensation and continued to refuse to lower the pipeline under these conditions until 27 June 1956. On that date the Commissioners Court of McLennan County passed an order stating that if Sinclair would go ahead and lower its pipeline that such action would not in any way prejudice any claim Sinclair might have in the future resulting from such lowering. Sinclair lowered its pipeline and made claim for the cost of lowering same, which claim was rejected by the Commissioners Court of McLennan County. The portion of Farm to Market Road 1860 which crossed Sinclair's pipeline was new construction and not merely improvement of an existing road.

"Sinclair based its claim for compensation for the cost of relocating its pipeline on Article I, Sec. 17 of the Texas Constitution, Vernon's Ann. St., which provides:

> 'No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person * * *.'

Sinclair's pipeline easement is property in the Constitutional sense. 12 Am. Jur. p. 787, Sec. 157. An easement is an interest in land for which the owner is entitled to compensation as much so as if the land to which the easement is appurtenant were taken. 29 C.J.S. Eminent Domain § 105, p. 910; Panhandle Eastern Pipe Line Co. v. State Highway Comm. of Kansas, 294 U.S. 613, 55 S.Ct. 563, 79 L.Ed. 1090; Buckeye Pipe Line Co. v. Keating, 7 Cir., 229 F.2d 795; Forest Lawn Lot Owners Ass'n v. State, Tex. Civ. App., 248

S.C. 2d 793; City of LaGrange v. Pieratt, 142 Tex. 23, 175 S.W. 2d 243.

"Sinclair Pipe Line Company has a property right in its easement that it had obtained over the Neale farm. McLennan County not only requested Sinclair to lower its pipeline but pursued that request until Sinclair agreed to lower its pipe. Sinclair refused to lower its pipe until it was reimbursed, and maintained such position until it was assured by an order of the Commissioners Court that such lowering would not in any way prejudice its right to proceed with claim against the County.

"McLennan County relies on the case of Sinclair Pipe Line Co. v. *Archer County, D.C., 147 F. Supp. 650, affirmed 5 Cir., 245 F. 2d 79.* This was a case in which Archer County agreed to furnish the right of way for a state road project, which crossed a Sinclair pipeline. In that case Sinclair lowered its pipeline on its own volition, without even having been required or requested to do so by the County. In that case the 5th Circuit Court, in affirming a judgment for Archer County denying Sinclair compensation for lowering its pipeline, held that where the county had not condemned the pipeline easement *or requested removal of the pipeline,*[2] the company could not recover expenses incurred in relocation of lines.

"The Archer County case holds that an easement is property; that Sinclair's easement was in that case taken; and that Sinclair is entitled to reimbursement from the proper source for such expenditure. Recovery by Sinclair against Archer County was denied by reason of the fact that Archer County had not condemned the pipeline easements or requested removal of the pipeline."

* * *

[2] Emphasis the court's.

"Here McLennan County undertook to furnish *all*[3] the right of way for the construction of Farm to Market Road 1860. This was new construction at the point in issue. Sinclair had an easement for its pipeline which the road had to cross. Such easement is property. McLennan County requested Sinclair to remove the pipeline, Sinclair refused (but later assented when McLennan County agreed that no rights would be lost by Sinclair in doing so). Sinclair's property was to all intents and purposes taken and Sinclair is entitled to compensation therefor. The Archer County case is not contrary to the foregoing but actually supports the result herein reached. Sinclair Pipe Line Co. v. State, Tex. Civ. App. Ft. Worth, 322 S.W. 2d 58 is an analogous case and supports our conclusions herein. McLennan County's contention is overruled."

• • •

"The judgment of the Trial Court is affirmed."

Sinclair Pipe Line Company v. State, 322 S.W. 2d 58, 59-61 (Tex. Civ. App., Fort Worth, 1959).

"In 1918 appellant's easement was acquired by private grants, on which it constructed its pipe lines and had operated them for 38 years when appellee, in 1956, secured from the landowners highway rights of way easements which crossed appellant's pipe line easement at two places. The parties failed to reach an agreement as to what compensation appellant was entitled to receive; and prior to the beginning of the construction work by appellee, under an agreement that condemnation proceedings would be instituted by appellee for the purpose of determining the amount of compensation appellant should be awarded, appellant made the necessary alterations and

[3] Emphasis the court's

adjustments in its pipe lines to accommodate and facilitate the road construction. This work consisted of lowering, encasing, and venting the pipe lines, in conformity with a regulation promulgated by the Highway Department on May 10, 1956. It was stipulated that the reasonable cost expended by appellant in this work was the sum of $3,907.19. It was also stipulated that benefits to appellant, if any, were limited to the correction of conditions which would not have existed but for the construction and improvement of the roads over the pipe lines. Appellant sought only the cost of making the alterations in the portions of its pipe lines embraced in and under the newly acquired road rights of way.

"Appellant concedes that appellee had the right to condemn appellant's easement, but *insists that appellee has the constitutional and statutory obligation to make just compensation.* Appellee contends that denial of compensation was proper on the ground that the alterations made by appellant were required by law and by the rules and regulations of the Highway Commission and by the Highway Department: that appellee took whatever it did take, under its police power and not under its powers of eminent domain: *that appellant's expense was operational* and its denial was not in violation of the Fourteenth Amendment to the United States Constitution or Article 1, sec. 17, of the Texas Constitution, Vernon's Ann. St.: *that appellant's pipe lines were not taken or destroyed,* and appellee could not, in condemnation proceedings, require appellant to lower and adjust them: and that there was no evidence of the value of that part of appellant's easement which was condemned.

"Appellee's contentions are interesting and have been fairly presented, but we are nevertheless of the opinion that this suit was brought under the condemnation statute and

is governed by the same constitutional and statutory provisions which are applicable to other condemnation suits in this State.

"That this is such a suit is shown by appellee's pleadings in the case. It sought and obtained a judgment condemning appellant's property for right of way purposes. It was stipulated that condemnation proceedings were properly before the trial court. Appellee's brief on this appeal affirms that 'This case is one wherein the State of Texas, *acting by and through the Commissioners' Court of Montague County,* Texas, under its power of eminent domain, brought suit to acquire an easement right of way over, upon and across Sinclair Pipe Line Company's pipeline easements and pipe lines * * * for the purpose of constructing and maintaining Farm to Market Roads * * *. Condemnation proceedings were filed, and on September 23, 1957, after hearing the evidence submitted by both parties, the Commissioners denied Appellant any recovery of damages by reason of the condemnation of Appellant's pipe line easements * * *. Upon the trial of the case before the County Court, without a jury, upon an agreed statement of facts, judgment was rendered granting Appellee highway rights of way easements over, upon and across Appellant's pipe line easements * * * and the Court * * * denied Appellant any damages by reason of its pipe line rights of way easements being condemned * * *.'

"The Fourteenth Amendment to the United States Constitution prevents appellee from taking property without due process of law. Article 1, sec. 17, of our State Constitution prevents appellee from taking, damaging, or destroying for or applying to public use any property without adequate compensation being made.

"Appellant's *easement* is property in the constitutional sense. 18 Am. Jur., p. 787, sec. 157. 'An easement is an interest in land for which the owner is entitled to compensation, as much so as if the land to which the easement is appurtenant were taken or injured.' 29 C.J.S. Eminent Domain § 105, p. 910." • • •

"Appellee acquired rights of way easements from the owner of the fee, from whom appellant had previously acquired its easements. Appellee acquired no more rights than the owners retained when they conveyed the easements to appellant. These owners could not convey to appellee what they had already conveyed to appellant." • • •

"Arguments in analogous cases that the taking or damaging was in the exercise of police power were considered and rejected in . . . Panhandle Eastern Pipe Line Co. v. State Highway Commission (Kan.), 294 U.S. 613, 55 S. Ct. 563, 79 L. Ed. 1090; Buckeye Pipe Line Company v. Keating, 7 Cir., 229 F. 2d 795;" • • •

"*An easement is taken* when the condemnor interferes with its owner's use. Buckeye Pipe Line Company v. Keating, supra. Appellant asks no more than the cost of the alterations to accommodate the road construction.

• • •

"In Panhandle Eastern Pipe Line Co. v. State Highway Commission (Kan.), supra, it was held that legislation requiring the pipe line company, at its own expense, to make alterations in its line to accommodate proposed highway construction, would result in taking private property without compensation, and was inhibited by the Fourteenth Amendment to the Federal Constitution."

• • •

"Having made the alterations in advance of appellee's construction work on appellee's promise to file a condemna-

tion suit in order that appellant's damages might be ascertained, we think appellant is entitled to recover its minimum damage."

• • •

"The judgment is reversed and judgment rendered for appellant."

Magnolia Pipe Line Company v. City of Tyler, 348 S.W. 2d 537, 539, 540-541, 543 (Tex. Civ. App., Texarkana, 1961, error refused).

"Magnolia in the trial court contended among other things that its easement rights were superior to the reserved rights of the grantors, that the acts of the City in uncovering the pipe line on one street and attempting to pave very near to the line on another street, and *taking a portion of its pipe line right-of-way, thereby interfering with its enjoyment of its easement* privileges by the construction of new street paving, would constitute a taking of Magnolia's property without due process of law, and would violate its constitutional rights under both the Texas and Federal constitutions. It was Magnolia's contention therefore that the City was due to pay to Magnolia the agreed reasonable costs for lowering and encasing the pipe line. Magnolia further denied the claims of the City that it was acting in the proper exercise of its police power."

• • •

"The trial court found in its findings of fact that it was necessary to lower and encase the pipe line at both streets, and further found to the effect that unless Magnolia's pipe line was lowered and encased that same would be the cause of serious danger to the public and held to the effect that Magnolia's use thereof was subject to reasonable regulation by the City, and that it was a valid exercise of the police power by the City to cause Magnolia to lower and encase

its high pressure pipe oil line where crossed by the city streets in question, at Magnolia's cost and expense, in order to meet the needs of the public for safe travel and transportation. The trial court rendered judgment against Magnolia on its cross-action to recover from the City the amount of the costs agreed upon as reasonable, and being the sum of $3,630.98. Magnolia has appealed."

• • •

"Art. 1, Sec. 17, of our State Constitution, Vernon's Ann. St., prevents the taking, damaging, or destroying for or applying to public use any property without adequate compensation being made, unless consented to by the owner of such property. Also the Fourteenth Amendment to the United States Constitution prevent the taking of a person's property without due process of law.

"Magnolia's pipe line *easement* is property in the constitutional sense 12 Am. Jur. p. 787, Sec. 157.

"An easement is an interest in land for which the owner is entitled to compensation as much so as if the land to which the easement is appurtenant were taken. 29 C.J.C. Eminent Domain § 105, p. 910; McLennan County v. Sinclair Pipe Line Company, Tex. Civ. App., 323 S.W. 2d 471, wr. ref., n.r.e.; Panhandle Eastern Pipe Line Co. v. State Highway Comm. of Kansas, 294 U.S. 613, 55 S. Ct. 563, 79 L. Ed. 1090; Buckeye Pipe Line Co. v. Keating, 7 Cir., 229 F. 2d 795;" • • •

"Magnolia had a property right in its two easements it had obtained from Nichols and Thedford. The City of Tyler requested and demanded that Magnolia lower and encase its pipe line. Magnolia refused to lower and encase the pipe line at its own cost and expense, and maintained such position until the written agreement was entered into heretofore referred to, wherein it was clearly set forth that

the lowering and encasing of such pipe lines under the streets in question would not in any way prejudice Magnolia's right to seek reimbursement for the costs thereof from the City. Thus it is clear that Magnolia was not a 'volunteer' in lowering and encasing its pipe line at the streets in question.

"In McLennan County v. Sinclair Pipe Line Company, supra, Tex. Civ. App., 323 S.W. 2d 471, 474, wr. ref., n.r.e., a somewhat analogous case to the case at bar, Sinclair (who protested and was not a volunteer) was allowed to recover from McLennan County the expense of lowering and encasing its pipe line at points where a *new*[4] road was placed over it by McLennan County. We quote briefly from the Court's opinion in said case as follows:

> 'Here McLennan County undertook to furnish all the right of way for the construction of Farm to Market Road 1860. This was new construction at the point in issue. Sinclair had an easement for its pipeline which the road had to cross. Such easement is property. McLennan County requested Sinclair to remove the pipeline, Sinclair refused (but later assented when McLennan County agreed that no right would be lost by Sinclair in doing so). Sinclair's property was to all intents and purposes taken and Sinclair is entitled to compensation therefor. The Archer County case is not contrary to the foregoing but actually supports the result herein reached. Sinclair Pipe Line Co. v. State., Tex. Civ. App., Ft. Worth, 322 S.W. 2d 58 is an analogous case and supports our conclusions herein. McClennan County's list contention is overruled.'

"Sinclair Pipe Line Company v. State of Texas, Tex. Civ. App., 322 S.W. 2d 58, 60, no writ history, is also a somewhat analogous case to the case at bar, and holds

---

[4] Emphasis the court's.

that where the State of Texas acquired highway rights from owners of the fee crossing over and invading easements which such owners had previously granted to Sinclair Pipe Line Company for a private pipe line, that the State invaded the pipe line company's easement by requiring it to change locations of pipes in connection with construction and improvement of roads, and such taking or damaging was not in the valid exercise of the police power, and that the pipe line company was entitled to receive as a minimum the cost of alterations and adjustments made in the pipe lines to accommodate and facilitate the road construction." * * *

"While undoubtedly the police power of a city is vast, as outlined by the cases cited by appellee in its excellent brief, it is also clear that such power must be *validly exercised.*[5] Since the *pipe line easements* were never dangerous to the public until the same were invaded by the City, and the dangerous conditions were proximately caused by the invasion of such easements by the City, we hold that the City under such circumstances *could not* in the guise of its police power *take or damage Magnolia's easements* without paying Magnolia adequate compensation therefor under Art. 1, Sec. 17, of our State Constitution, and under the Fourteenth Amendment of the United States Constitution.

"Appellant's points are sustained. The judgment of the trial court is reversed and judgment is here rendered for Appellant Magnolia for the sum of $3,630.98 against appellee City of Tyler.

"Reversed and rendered."

---

5 Emphasis the court's.

APPENDIX D

Conflicting Opinions of the Attorney General of Texas

[SEAL]

THE ATTORNEY GENERAL
OF TEXAS

Austin 11, Texas

WILL WILSON
Attorney General

July 12, 1961

Miss Edna Cisneros
County Attorney
Willacy County
Raymondville, Texas

Opinion No. WW-1090
Re: Whether the Commissioner's Court, without paying compensation therefor, can require a gas pipeline company to encase in metal and vent its pipeline under the facts stated.

Dear Miss Cisneros:

You have requested the opinion of this office on the following question:

> "May the Commissioner's Court, without paying compensation therefor, require a gas pipeline company to incase in metal and vent its pipeline under and across a road which is to be paved, not only across the right-of-way of such road in existence at the time such pipeline was laid, but in addition, to incase in metal and vent such pipeline lying across and under the contiguous right-of-way thereafter acquired by the County for the purpose of widening such road?"

As we understand your question and the factual situation which prompted its submission, the pipeline in question, at the time it was laid, crossed beneath an existing roadway which is under the jurisdiction of the Commissioner's Court

of Willacy County and sometime thereafter the Commissioner's Court acquired additional right-of-way for the purpose of widening and improving the existing roadway. The contemplated improvement of the roadway requires that the pipeline be enclosed in metal casing and vented.

The situation raised by the facts presented requires that we consider the pipeline that must be encased and vented in two distinct categories, to wit: (1) that portion under the existing roadway and (2) that portion under the additional right-of-way which was acquired after the pipeline was in place.

Having placed its transmission lines under the existing roadway subsequent to the effective date of Article 1436b of Vernon's Civil Statutes, the pipeline company in question is subject to the provisions and requirements of this Article, which provides in part as follows:

> "... The public agency having jurisdiction or control of a highway or county road, that is, the Highway Commission or the Commissioners Court, as the case may be, may require any such person, firm or corporation or incorporated city or town at its own expense to relocate its pipes, mains, conductors or other fixtures for conducting gas on a state highway or county road outside the limits of an incorporated city or incorporated town so as to permit the widening or changing of traffic lanes, by giving thirty (30) days written notice to such person, firm or corporation or incorporated city or town and specifying the facility or facilities to be moved and indicating the place on the new right-of-way where such facility or facilities may be placed. Such person, firm or corporation or incorporated city or town shall replace the grade and surface of such road or highway at its own expense."

Consequently, it is our opinion that the portion of the pipeline which passes under the roadway as it existed prior to the acquisition of the additional right-of-way is governed

by our holding in WW-961 (November 18, 1960) and the language therein quoted from *State* v. *City of Austin*, ... Tex. ....., 331 S.W. 2d 737 (1960) and you are hereby advised that the pipeline company can be required to encase and vent this portion of its pipeline at its own expense and without compensation from the county.

The remaining portion of the pipeline affected by the plannned improvement and widening program, i.e., that portion passing under the additional right-of-way acquired by the county in order to effectuate the widening and improvement of the roadway, presents a different question.

As your request indicates, the pipeline company had acquired an easement for its pipeline under the property adjacent to the existing roadway prior to the time such property was acquired by the county as part of the right-of-way.

Section 17 of Article I of the Constitution of the State of Texas provides that:

> "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; . . ."

Since the existing easement of the pipeline company was not condemned or otherwise acquired by the county at the time the additional right-of-way in which it now lies was acquired, any requirement that this portion of the pipeline be encased and vented would be a taking of the pipeline company's easement and is prohibited by Section 17 of Article I of the Constitution of the State of Texas unless adequate compensation is paid to the pipeline company. See WW-125 (May 22, 1957) and WW-1004 (March 6, 1961).

Therefore, you are advised, that in our opinion the pipeline company in question cannot be required to encase and

vent that portion of its pipeline which lies within a prior easement under the property acquired by the county for roadway improvement and widening purposes without compensating the pipeline company therefor.

SUMMARY

The Commissioner's Court is authorized to require a pipeline company to encase and vent that portion of its pipeline which crosses under an existing roadway at the pipeline company's own expense and without reimbursement, but the Commissioner's Court cannot require the pipeline company to encase and vent that portion of its pipeline which lies in a pre-existing easement under property acquired for the improvement of such roadway without compensating the pipeline company therefor.

Yours very truly,

WILL WILSON
Attorney General of Texas

By /s/ W. O. Shultz
W. O. Shultz
Assistant

WOS:mm

APPROVED:

OPINION COMMITTEE
W. V. Geppert, Chairman

John Reeves
John Leonarz
Linward Shivers
Marvin F. Sentell

REVIEWED FOR THE ATTORNEY GENERAL

BY: Morgan Nesbitt

[SEAL]

THE ATTORNEY GENERAL
OF TEXAS

Austin 11, Texas

WILL WILSON
Attorney General

March 6, 1961

Mr. Ellis A. Qualline, Jr.
County Attorney of Montgomery County
Conroe, Texas

Opinion No. WW-1004

Re: Whether Commissioners' Court may require gas pipe line company to move or lower its pipe lines which are now in, along, or across a new right of way location to be purchased for a prospective farm-to-market road.

Dear Mr. Qualline:

Your request for an opinion is in the following language:

"The Commissioner's Court of Montgomery County has requested information that goes beyond your opinion No. WW-961. They are purchasing right-af-way on which the State of Texas will construct a farm-to-market road.

"May the Commissioner's Court of Montgomery County require gas pipe line companies to move or lower their pipe lines along or across this right-af-way for the proposed road without paying them compensation therefor?"

Our holding in Opinion No. WW-961, to which you refer, is reflected in the "Summary" thereof, which we quote:

> "The Commissioners' Court of Sherman County, Texas, is authorized to require gas pipeline companies, whose lines run along or across public roads which are to be paved, to move or lower such pipelines at their own expense and without reimbursement from the State."

That opinion pertains to a pipe line which has been laid in an existing street. Our conclusions were based upon *State* v. *City of Austin*, . . ., Tex. . . ., 331 S.W. 2d 737 (1960), which in turn is predicted upon Section 1 of Article 1436b, V.C.S. We quote the applicable portions of that statute:

> "Section 1. Any person, firm or corporation or incorporated city or town engaged in the business of transporting or distributing gas for public consumption shall have the power to lay and maintain pipes, mains, conductors and other facilities used for conducting gas through, under, along, across and over all public highways, public roads, public streets and alleys, and public waters within this State; provided that within the corporate limits of an incorporated city or incorporated town such right shall be dependent upon the consent and subject to the direction of its governing body. . . . *The public agency having jurisdiction or control of a highway or county road, that is, the Highway Commission or the commissioners Court, as the case may be, may require any such person, firm or corporation or incorporated city or town at its own expense to relocate its pipes, mains, conductors or other fixtures for conducting gas on a state highway or county road outside the limits of an incorporated city or incorporated town so as to permit the widening or changing of traffic lanes. . . .*" (Emphasis Added)

It is thus seen that pipe line companies may lay their pipe lines in existing highways, roads, streets, etc., but, in

turn, may be required by the governing authority to relocate them so as to permit the widening or changing of traffic lanes.

A different situation exists in your case. Your letter to the Attorney General dated February 4, 1961, supplementing information in your opinion request, makes it plain that the proposed farm-to-market road is on new location and that the pipe line in question is on private property. This being true, there is no statute or law by which the pipe line company can be required to move or lower its pipe lines. Doubtless this pipe line lies within an easement secured by the company from the owner of the land.

Section 17 of Article I of the Constitution of Texas states:

> "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person."

If by negotiation your Commissioners' Court cannot persuade the company to move this pipe line you will have to pay it therefor. If a price cannot be agreed upon you will have to condemn the easement, of which the pipe line is a part. If the Commissioners' Court cannot agree with the owner of the fee on the value of the land then a condemnation suit should be brought jointly naming both the fee owner and the pipe line company as condemnees.

In answer to your question, therefore, it is our opinion, and we so hold, that the Commissioners' Court of Montgomery County may not require a pipe line company to move or lower its pipe lines from the private premises upon which a future road is contemplated.

SUMMARY

The Commissioners' Court may not require a gas pipe line company to move or lower its pipe lines which are now in, along, or across a new right of way location being acquired for a proposed farm-to-market road.

Yours very truly,

WILL WILSON
Attorney General of Texas

By /s/ W. Ray Scruggs
W. Ray Scruggs
Assistant

WRS:vj

APPROVED:

OPINION COMMITTEE
W. V. Geppert, Chairman

Jerry Roberts
Riley Eugene Fletcher
Thomas Burros

REVIEWED FOR THE ATTORNEY GENERAL

By: Morgan Nesbitt

[SEAL]

THE ATTORNEY GENERAL
OF TEXAS

Austin 11, Texas

WILL WILSON
Attorney General

May 22, 1957

Honorable Fred F. Holub
County Attorney
Matagorda County
Bay City, Texas

Opinion No. WW-125

Re: Authority of County to reimburse Pipe Line Company for expenses incurred by virtue of acquiring right of way where there is a pre-existing pipe line.

Dear Sir:

The following question was presented in your recent letter:

> "The question that is presented here is that when the State Highway Commission takes over an existing County Road for the purpose of constructing a F.M. Highway and requests additional rights of way to be purchased by the County for a wider right of way than originally included in the County road right of way, and said old County road is crossed by a pipe line of a common carrier, must the County pay said common carrier for meeting State specifications in lowering and additional casing of the pipe line under the widened portion of said right of way?"

In your letter you also offered the following comment:

> "It would appear, taking into consideration Article 6022 and 2351 that although the common carrier would have the right to cross a public road, where same is a County road under Article 2351, the Commissioners Court in its exercise of general control could control the method of crossing and the location of crossing. Here in this case, had the common carrier made a formal notice of crossing, the Commissioners Court, could, it would be reasonable to assume, foresee a future widening of said road and require the crosssing to provide for future widening. As it appears that no formal approval or notice of crossing was procured by the common carrier, it would appear that now any additional casing or lowering should be done at the expense of the common carrier."

We refer you to Opinions WW-45 and WW-78 (which are enclosed) holding, in effect, that the expenses for relocation of a utility on right of way already subject to public use, must be borne by the utility rather than the public. However, your question as presented was limited to the proposition of whether or not reimbursement was required to be paid to the pipe line common carrier for meeting State specifications in lowering and additional casing of the pipe line under the new or additional right of way required for the widening program. Attorney General Opinion No. 0-2405A, dated October 9, 1940, which you mentioned you had in your files, states as to the measure of damage in a similar case:

> "Therefore, we are of the opinion that where the state has permitted such corporation as above mentioned to erect and construct its lines under and across public roads, and where the county requires the additional right of way for new highways or public roads over and across the private property of the above mentioned

> corporation, the county would be liable to said corporation *for the expense of casing said lines and burying them at a proper depth . . .*" (Emphasis added).

In *City of Denton* v. *Chastain,* Civ. App. 1941, NWH, 156 S.W. 2d 554, the court held:

> "It has long been the rule in this state that if by the taking of a portion of one's land for public use it becomes necessary to build fences, construct gates, culverts and other things necessary to make the remainder usable and to prevent greater losses sustained by the appropriation of that part taken, evidence of such expenses thus incurred should be considered by the jury in fixing the amount of damages to that part not appropriated. . . ."

Also, see *Pillot* v. *City of Houston,* Civ. App., 1932, NWH, 51 S.W. 2d 794.

Should this right of way have to be condemned, the cost of burying and providing additional casing would not be a separate issue, but should be considered in the general issues of the before and after values of condemnee's property. If, however, this right is acquired by out of court settlement, it seems that there would be no other way to compute what the pipe line company is entitled to but by considering the cost of reburying and providing additional casing, and it is considered that this is supported by ample authority as above set forth.

You pointed out, as above quoted, that you considered this situation different because the pipe line utility had not secured permission of the Commissioners' Court to cross the existing road and that "it would be reasonable to assume" that the Commissioners' Court would "foresee a future widening of said roads and require the crossing to provide

for future widening . . ." and for that reason there should be no liability for reburying and providing additional casing on the portion taken for new or additional right of way.

It is submitted that this proposition has been decided adversely to your contention in *Hammond* v. *Wichita County*, Civ. App., 1956, 290 S.W. 2d 545 (no writ history):

> "Wichita County has no right to destroy appellant's property prior to the lawful appropriation thereof by paying or securing the payment of compensation. City of Fort Worth v. Dietert, Tex. Civ. App., 271 S.W. 2d 299, error refused.
>
> "Conversely, the County has no right to restrain appellant from making lawful use of his property prior to a legal taking thereof by the County.

Hence, assuming, without deciding, that the statutes impose upon the pipe line common carrier the duty of clearing with the Commissioners' Court before crossing a county road, and even assuming that the Commissioners' Court has foreseen the widening, it could not have required the pipe line common carrier to make special preparations, at additional expense, on land not in the then existing right of way as such would have been a restraint upon the use of private property prior to a legal taking thereof.

SUMMARY

Where a pipe line crosses under an existing county road, which road is desired by the State as a Farm to Market road, and additional right of way is required to widen the road, the governmental authority securing this additional right of way is authorized to pay the pipe line common carrier for expenses incurred in meeting state specifications which specifications require the lowering of the pipe line and additional casing

therefor under the widened, or newly acquired, right of way.

Yours very truly,

WILL WILSON
Attorney General of Texas

By /s/ Joe G. Rollins
Joe G. Rollins
Assistant

APPROVED:

OPINION COMMITTEE
H. Grady Chandler, Chairman

Fred Werkenthin
Ralph R. Rash
Jas. W. Wilson

REVIEWED FOR THE ATTORNEY GENERAL BY:

Geo. P. Blackburn

THE ATTORNEY GENERAL OF TEXAS

Austin 11, Texas

This opinion overrules
Opinion No. O-2405

Gerald C. Mann

Hon. Fred Norris
County Auditor
Polk County
Livingston, Texas

Opinion No. O-2405-A
Reconsideration of Opinion
No. O-2405
Re: Highways — Pipe Lines

Dear Sir:

In your original request for an opinion of this Department upon the matters therein discussed you attached a copy of a franchise that Polk County granted to the Shell Pipe Line Corporation in 1931. Pursuant thereto, the Shell Pipe Line Corporation laid pipe lines and erected telephone lines under, above, across, etc. the public roads of Polk County. Then in 1938 Polk County was called upon by the State Highway Department to secure right-of-way for various highway constructions, most of which was newly located along the old highway, consequently, the Shell Pipe Line Corporation was called upon to lower its pipe line in several places and to case the pipes at these new locations. Some of these new locations were only a few yards from the old locations, but the above mentioned work was necessary.

About December, 1928, said corporation presented Polk County with an account representing the cost necessitated

by the above mentioned work. The commissioners' court passed an order that the same be paid, but the auditor refused to sign the warrant, and to date the corporation has not received any compensation, but now demands that the account be paid. The present commissioners' court at a recent meeting rescinded the former order of said court passed by their predecessors ordering that the account be paid. Under the above mentioned facts your original inquiry presented the following question:

> "Please advise, as to your opinion, as to whether Polk County owes Shell Pipe Line Corporation anything or not."

And in answer to the above in our original Opinion No. O-2405, it was held in effect that the commissioners' court or Polk County had no authority to pay the claim.

Under the facts stated in the original request it was assumed that the above mentioned corporation was constructing and running its pipe lines under existing public roads. However, under the actual facts presented to this Department the said corporation had right-of-way deeds for all the pipe line laid in Polk County and the new highways crossed the right-of-way of the said corporation at several different places, due to the construction of the new highways, the corporation was forced to lower and case its lines in compliance with the State regulations and law, and at no point along the pipe line did the new highway use the old highway right-of-way.

It is a fundamental principle of law that private property shall not be taken for public use without adequate compensation, and that no person shall be deprived of his property except by due course of law. Therefore, we are of the opinion that where the state has permitted such corporation as above mentioned to erect and construct its lines under

and across public roads, and where the county requires the additional right-of-way for new highway or public roads over and across the private property of the above mentioned corporation, the county would be liable to said corporation for the expense of casing said lines and burying them at a proper depth. We think that our Opinion No. O-2274, and the authorities cited therein, is applicable to the question here under consideration and enclose a copy of the same for your convenience. Our original Opinion No. O-2405 is hereby withdrawn.

Trusting that the foregoing fully answers your inquiry, we are

Yours very truly

ATTORNEY GENERAL OF TEXAS

By /s/ Ardell Williams
Ardell Williams, Assistant

APPROVED OCT 9, 1940

/s/ Gerald C. Mann
ATTORNEY GENERAL OF TEXAS

AW:BBB:wb

APPROVED: OPINION COMMITTEE
BY BWB Chairman

LE COPY

Office-Supreme Court, U.S.
FILED
AUG 8 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 272

TRUNKLINE GAS COMPANY,
Petitioner,

v.

HARDIN COUNTY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

WILLIAM ROBERT SMITH
1508 Tower Life Building
San Antonio 5, Texas
Counsel for Respondent

Of Counsel:

SEARS AND BURNS
ROBERT L. BURNS
1811 C & I Life Building
Houston 2, Texas

PRINTED IN U.S.A. — BY DELARUE/TEXAS

INDEX

	PAGE
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	6
I. THE PETITION DOES NOT PRESENT SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT	6
A. No Question on the Court of Appeals' Construction of Vernon's Ann. Civ. Stats., Article 6674n-3 is Presented	6
B. The State Constitutional Question is Episodic	7
II. THE DECISION OF APRIL 15, 1964 IS CORRECT	8
A. The Court of Appeals' Construction of Article 6674n-3	8
B. Petitioner's Construction of Article 6674n-3 Renders Section 2 Void	10
C. The Decision Does Not Conflict with Applicable State Law	12
III. THE DOCTRINE OF ABSTENTION IS INAPPLICABLE	15
IV. THE FRST DECISION IS CORRECT AND DOES NOT CONFLICT WITH APPLICABLE STATE LAW	15
V. ASSUMING CONFLICT, THE COURT BELOW WAS NOT REQUIRED TO FOLLOW McLENNAN COUNTY AND SINCLAIR PIPELINE COMPANY	21
VI. THE DECISION DOES NOT CONFLICT WITH FEDERAL DECISIONS	23
VII. ADDITIONAL GROUNDS PRESENTED TO THE COURT OF APPEALS	24
A. Assuming an Agreement to Pay For the Cost of Encasement is Acquisition of Right-of-Way, Conditions Precedent to Vesting Such Power in Respondent Were Not Performed	24
B. Petitioner's Encasement Was The Performance of a Legal Duty Assumed as an Incident of Exercising The Privilege of Placing Its Pipelines Across State Highways	26
C. Petitioner's Encasement Was the Performance of a Legal Duty in Response to the Exercise of the Police Power	29
CONCLUSION	30

LIST OF AUTHORITIES

Cases

	Page
Armstrong v. Walker, 73 S.W. 2d 520 (Tex. Sup. 1934)	11
Bell County v. Hines, 219 S.W. 556, 557 (Tex. Civ. App. 1920, error ref.)	14
Biggers v. Continental Bus System, 303 S.W. 2d 359, 364 (Tex. Sup. 1957)	25
Browning v. Hooper, 260 U.S. 396 (1926)	14
C vary Temple v. Taylor, 288 S.W. 2d 868 (Tex. Civ. App. 1956)	22
Canales v. Laughlin, 214 S.W. 2d 451 (Tex. Sup. 1948)	24
Chicago R.I. & G. R.R. Co. v. Tarrant County Water Control & Improvement District, 73 S.W. 2d 55 (Tex. Sup. 1934)	17, 28
City of Houston v. Derby, 215 S.W. 2d 690 (Tex. Civ. App. 1948, error ref.)	25
City of Meridian v. Southern Bell T. & T. Co., 358 U.S. 639 (1959)	15
Clark v. Greer, 232 S.W. 2d 876 (Tex. C.A. 1950)	18
Cofield v. Britton, 109 S.W. 2d 493 (Tex. C.A. 1908, err. dism.)	18
County of Allegheny v. Frank Meshuda Company, 360 U.S. 185 (1959)	15
Dockham v. Mercury Ins. Co., 135 S.W. 2d 700 (Tex. Sup. 1940)	20
Ex parte Ernest, 136 S.W. 2d 595 (Tex. Crim. App. 1940)	18
Fidelity Union Trust Company v. Field, 311 U.S. 169 (1940)	23
Fleming v. Houston Lighting & Power Co., 138 S.W. 2d 520 (Tex. Sup. 1940)	27
General American Life Ins. Co. v. Rios, 154 S.W. 2d 191 (Tex. Civ. App. 1941, reversed on other grounds 164 S.W. 2d 521)	22
Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945)	22
Gulf C. & S.F. Ry. Co. v. Milam County, 38 S.W. 747 (Tex. Sup. 1897)	17, 28
Hamilton Gaslight & Coke Co. v. City of Hamilton, 146 U.S. 258 (1892)	27
Henson v. Commissioners Court of Henderson County, 56 S.W. 2d 240 (Tex. Civ. App. 1932, error ref.)	13, 14
Humble Pipe Line Co. v. State, 2 S.W. 2d 1018 (Tex. Civ. App. 1928, error ref.)	28
J. I. Case Company v. Borak, 84 Sup. Ct. 1555 (1964)	7
Katzenberger v. City of Aberdeen, 121 U.S. 172 (1887)	11

PAGE

King v. Order of United Commercial Travellers of America, 333 U.S. 153 (1948) 22, 23
Langnes v. Green, 282 U.S. 531 (1931) 24
LeTulle v. Scofield, 308 U.S. 415 (1940) 24
Lone Star Gas Company v. State, 153 S.W. 2d 681 (Tex. Sup. 1941) 28
Louisiana Power & Light Co. v. City of Thibodeaux, 360 U.S. 25 (1959) 15, 28
McLennan County v. Sinclair Pipeline Co., 323 S.W. 2d 471 (Tex. Civ. App. 1955, error ref. n.r.e.) 18, 19, 20, 21, 22, 23
Magnolia Pipeline Co. v. City of Tyler, 348 S.W. 2d (Tex. Civ. App. 1961, error ref.) 18, 20
Malone v. United State Fidelity & Guaranty Co., 9 S.W. 2d 461 (Tex. Civ. App. 1928) 22
Martin v. Creasy, 360 U.S. 219 (1959) 15
Mayor of City of Houston v. Houston City St. Ry. Co., 19 S.W. 127 (Tex. Sup. 1892) 26
Missouri K & T R. Co. v. Rockwall County Levee Improvement District, 297 S.W. 206 (Tex. Sup. 1927) 28
Neese v. Southern Railway Company, 350 U.S. 77 (1955) 7
Panhandle Eastern Pipeline Company v. State Highway Commission, 294 U.S. 613 (1935) 29, 30
Propper v. Clark, 337 U.S. 472 (1949) 12
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 7
Sacred Garden of Memory, Inc. v. State, 334 S.W. 2d 220 (Tex. Civ. App. 1960) 25
Simmons v. Lightfoot, 146 S.W. 871, 872 (Tex. Sup. 1912) .. 14
Sinclair Pipeline Co. v. Archer County, 147 F. Supp. 650 (N.D. Tex. 1956) 16, 19, 23
Sinclair Pipeline Company v. Archer County, 245 F. 2d 79 (CCA 5, 1957) 25
Sinclair Pipeline Co. v. State, 332 S.W. 2d 58 (Tex. Civ. App. 1959) 18, 19, 20, 21, 22, 23
Sioux City Street Ry. Co. v. Sioux City, 138 U.S. 98 (1891) .. 27
Southwestern Telephone & Telegraph Co. v. City of Dallas, 174 S.W. 636 (Tex. Civ. App. 1915, error ref.) 27
Spigel's Estate v. Commissioner of Internal Revenue, 335 U.S. 701 (1949) 15
State of California v. Taylor, 353 U.S. 553 (1957) 23
State of Texas v. City of Austin, 331 S.W. 2d 737 (Tex. Sup. 1960) 9, 12, 16, 23, 26
Storrie v. Houston City St. Ry. Co., 46 S.W. 796 (Tex. Sup. 1893) 26

PAGE

Supreme Forest Woodmen's Circle v. City of Belton, 100 F. 2d 655 (C.C.A. 5, 1938) 18
Trader's Compress Co. v. State, 77 S.W. 2d 245 (Tex. Civ. App. 1934) 25
United States v. Durham Lumber Co., 363 U.S. 522 (1960) 12, 15
Welch v. State, 148 S.W. 2d 876, 879 (Tex. Civ. App. 1941, error ref.) 13
West v. American Telephone & Telegraph Co., 311 U.S. 223 (1940) 21, 22

Texas Constitution

Article I:
Section 17 26
Article III:
Section 44 ..... 1, 10, 11, 14
Section 51 1
Section 52 ..... 1, 10, 12, 13
Section 53 ..... 1, 10, 11, 12, 13, 14
Section 55 1
Article VIII:
Section 7a 16

Statutes

[Vernon's Ann. Civ. Stats. by Article Number]

1436 ..... 2, 27
1436b 2, 9, 27
1497 ..... 2, 27
1728 20
6021 2
6320 ..... 2, 27
6327 ..... 2, 27
6663 ..... 2, 29
6665 29
6666 ..... 2, 29
6667 ..... 2, 17
6673 ..... 1, 16, 18, 29
6674a 2
6674n 1, 16, 18, 24, 25
6674n-3 ..... 1, 6, 8, 10
6674q-4 ..... 2, 16, 18, 29
6674w-4 ..... 9, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 272

TRUNKLINE GAS COMPANY,

Petitioner,

v.

HARDIN COUNTY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

To the Honorable Supreme Court of the United States:

Respondent, HARDIN COUNTY, presents this Brief in Opposition to the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on April 15, 1964.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Texas Constitution, Sections 44, 51, 52, 53 and 55, Article III, are set out in Appendix B to the Petition. The pertinent statutes are Vernon's Ann. Civ. Stats., Article 6673, 6674n, 6674n-3

and 6674q-4, set out in Appendix B to the petition, and Articles 1436, 1497, 1436b, 6021, 6320, 6327, 6663, 6665, 6666, 6667, 6674a, set out in Appendix A, *infra*, pp. 34-40.

STATEMENT OF THE CASE

To prevent definite hazards to vehicular and other traffic, the highway and the pipeline, since 1949, by maintenance manuals and administrative order, the Texas Highway Department[1] has required that pipelines carrying gas across a state highway be encased for the full width of the right-of-way and vented at each end (R. 28-35). The packed nature of the soil under, and the pressure and weight of vehicular traffic on, a roadway causes unusual stresses on an unencased gas pipeline which may result in damage to the pipeline, cave-ins of the roadway, escaping gas subject to explosion and other hazards, and extensive corrosion by electrolysis. Encasement provides protection to the gas pipeline from the compact soil, weight and pressure of vehicular traffic and electrolysis; prevents leaks, escaping gas and other hazards; provides a passage for the gas to escape to the vents at the right-of-way lines; and eliminates traffic hazards resulting from escaping gas and cave-ins in the roadway by permitting repair of the pipeline without obstructing traffic by cutting the pavement (R. 28, 29, 27, 115, 116).

In 1950, the Department issued written permits authorizing Petitioner to install gas pipelines across U. S. Highway 69 and F.M. Highway 418 in Hardin County, on the condition, among others, that the pipes be placed through a hole bored beneath the highways and an iron casing extending from the right-of-way line to right-of-way line, and

[1] Hereinafter called "Department."

sealed and vented at the ends (R. 186, 88, and 189). Petitioner constructed its line (encased and vented) across each highway (R. 14, 19) and, in 1951, acquired pipeline easements from the owners of the lands abutting the crossing (R. 233-235).

Respondent thereafter undertook to acquire right-of-way to widen each highway, but Petitioner inaccurately states that the Department determined to widen said highways. There is no evidence of an order of the State Highway Commission directing the widening of either highway. In 1955, Respondent contracted with the Department to acquire right-of-way for, furnish and remove all obstructions on F.M. Highway 418 (R. 204, 205). There is no evidence of Respondent contracting to acquire right-of-way for U. S. Highway 69. Except as authorized by contract, the Department could not require Respondent to acquire any right-of-way.

The Department furnished Respondent plats, field notes and right-of-way deeds (naming the grantors) for each parcel of land the Department requested Respondent to acquire (R. 66, 189, 196), but did not furnish Respondent a plat, field notes or a right-of-way deed of Petitioner's easements abutting either highway and did not request Respondent to purchase or condemn Petitioner's easements (R. 66). Pursuant to the requests (plat, field notes and deeds) of the Department, Respondent acquired from various owners all right-of-way necessary for the widenings, including the parcels of land owned by the grantors of Petitioner's easements (R. 66). As Petitioner admits, however, "Respondent made no effort in either instance to purchase or condemn Petitioner's private easements or any right or interest therein" (Petition, p. 5). Petitioner is still using its easements, its pipelines were not removed and neither Respondent nor the State of Texas acquired any interest from Petitioner.

While Respondent was acquiring right-of-way for widening the highways, the Department, on several occasions, requested Petitioner to encase and vent its pipelines in the right-of-way acquired to widen the existing highways (not new highways) in accordance with the permits under which they were installed (R. 67, 194, 214). Petitioner repeatedly refused to comply with the request unless assured reimbursement for its actual cost (R. 15, 20, 197, 219).

The sole basis of Petitioner's statement that the Department considered an uncased pipeline an obstruction is the testimony of local engineers that, from an engineering point of view, anything in the way of construction or maintenance was an obstruction, and that such conclusion was simply an engineer's attempt to interpret Respondent's contract (R. 86, 104, 115). Similarly, there is no basis for Petitioner's statement that the Department officials considered that Respondent had the responsibility to compensate for casing its pipeline. Local engineers attempted to so interpret Respondent's contract, but admitted that they would not state Respondent owed Petitioner reimbursement, but only that reimbursement would not come from the State (R. 83-87, 101-105, 115, 125-127).

The "officials" did not refer the matter of compensation to Respondent. A local engineer wrote Petitioner that, as to the question of reimbursement, the State could not help, as "the clearing of right-of-way is a matter handled by the County" (R. 199), and local engineers refused to testify that they had even referred Petitioner to Respondent. (R. 117-118, 126-127). After Petitioner's repeated refusals, Respondent's County Judge entreated Petitioner to comply with the Department's request. (R. 200, 227). Petitioner replied that it realized that Respondent was "not responsible for the specification that the highway in question be

cased", but that it would not commence casing until informed it would be reimbursed (R. 202-204). Respondent then passed an order stating that Petitioner "is authorized to extend the casing of their pipelines across U. S. Highway 69 at county expense" (R. 149).

The County Judge advised Petitioner that it was the County's contention that payment for extended casing on F.M. Highway 418 would be illegal and, following Petitioner's reply arguing that Respondent had authority to pay for the casing (R. 226-227), Respondent passed an order that it would pay "according to law all legal claims affixed against it, for the casing" of pipelines across State Highways (R. 228).

Following each order, Petitioner encased its pipelines as requested by the Department (R. 205-207, 227-230). Respondent refused to reimburse Petitioner and Petitioner filed this suit. Motions for Summary Judgment were filed by both parties, and the District Court, filing findings of fact and conclusions of law (R. 64-71), granted the motion of Petitioner and denied Respondent's.

The Court of Appeals concluded that Respondent did not have power to pay Petitioner to case its lines because (1) the Texas Highway Department has exclusive control of, and power and duty to construct and maintain state highways, (2) no funds of a Texas county can be expended for the construction or improvement of a state highway, (3) county funds may be expended only for the purpose of acquiring right-of-way, and (4) the extension of casing on a pipeline is incidental to construction and not to acquisition of right-of-way. Accordingly, the court reversed the dictrict court judgment and remanded the cause with directions that judgment be entered for Respondent. 311 F. 2d 882.

Without reaching the merits, this Court granted Petitioner's Petition for Writ of Certiorari, vacated the judgment and remanded the cause for the Court of Appeals to consider a new statute. Acts 1963, 58th Leg., Ch. 240, P. 654; Vernon's Ann. Civ. Stats., Article 6674n-3.

Upon remand, Petitioner contended that the new statute validated the questioned contracts. Respondent urged that (1) Petitioner's construction of Section 2 of the new statute rendered it void, and (2) Petitioner's construction of the section was erroneous. On April 15, 1964, the court rendered an opinion concluding that Petitioner's construction would violate the Texas Constitution and holding:

> "In addition to its contention that the Legislature could not validate and authorize the payment of funds in question here, appellant insists that the Legislative Act does not in terms or in effect purport to do so. The act is general and neither expressly nor impliedly deals with the situation involved in this case, and we are of the view that, since the statute would be so clearly unconstitutional if construed as an attempt to validate the questioned contracts, it is our duty to construe the statute as not intending to effect an unconstitutional result."

REASONS FOR DENYING THE WRIT

I.

THE PETITION DOES NOT PRESENT SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT

A. No Question on the Court of Appeals' Construction of Vernon's Ann. Civ. Stats., Article 6674n-3 is Presented

After concluding that Petitioner's construction of Article 6674n-3 would violate the Texas Constitution, the Court of

Appeals held that the statute "is general and neither expressly nor impliedly deals with the situation involved in this case". The only question relating to the second decision presented by the Petition is whether the statute "is void under the Texas Constitution". The "Questions Presented" do not seek review of the Court of Appeals' construction of the statute. The meaning of the statute is a primary question not a subsidiary question fairly comprised within the question of the validity of the statute. Rule 23, Supreme Court Rules. The latter question is not reached until after the meaning of the statute has been determined. By the limited review sought, Petitioner requests the court to deviate from the traditional practice of avoiding a constitutional question when the record discloses another ground of decision, *Neese* v. *Southern Railway Company*, 350 U.S. 77 (1955), and only considering questions raised in the "Questions Presented". *J. I. Case Company* v. *Borak*, 84 Sup. Ct. 1555 (1964).

B. The State Constitutional Question is Episodic

The statute purports to validate all contracts "heretofore made". A validating act is necessarily retroactive, and unlike a prospective statute, the question of its validity does not recur. Special and important reasons for granting a writ reach beyond the episodic. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955). The record does not support Petitioner's assertion that all 254 counties of Texas are affected by the question presented. The evidence does not show that any county other than Respondent has contracts which may be affected by the decision below.

II.

THE DECISION OF APRIL 15, 1964 IS CORRECT

A. The Court of Appeals' Construction of Article 6674n-3

The Court of Appeals held that Article 6674n-3 "is general and neither expressly nor impliedly deals with the situation involved in this case". The situation involves contracts by Respondent to reimburse Petitioner for encasing a pipeline in an area acquired for widening a state highway. Respondent made no effort to purchase or condemn Petitioner's private easements, but, without obtaining any interest in such easements, contracted to reimburse for the cost of the encasement.

The statute does not provide that the cost of adjusting utility facilities *under contracts by counties to pay for such costs* is an expense of right-of-way acquisition, but declares that *in the acquisition of highway rights-of-way* for the Department, such cost is declared to be an expense of the right-of-way acquisition. The title of the Act expresses the same purpose.[2]

Payment of the cost of utility adjustments as an incident of *acquiring the utility's easement* (acquisition of right-of-way) is not payment of the cost of a utility adjustment under a contract providing for that alone. The Department did not request Respondent to purchase or condemn Petitioner's easements or to acquire right-of-way from it in any way, and Respondent made no effort to acquire easements or right-of-way (R. 66). The terms of the statute are not applicable to these facts. Section 2 provides that contracts made by counties "for the purposes stated above"

---

[2] "An Act providing that in the acquisition of right-of-way by or for the Texas Highway Department, the cost of relocating or adjusting eligible utility facilities shall be treated as a right-of-way cost".

are ratified and validated. The only purpose "stated above" is the acquisition of highway rights-of-way. Section 1 makes no reference to a contract relating solely to the payment of the cost of utility relocation or adjustment.

The statute is only applicable to the cost "of relocating or adjusting utility facilities". Petitioner's pipelines were neither relocated nor adjusted. Petitioner encased the pipelines and they remain in the same location. The pipelines were neither raised nor lowered — merely encased.

The only cost declared to be an expense or right-of-way acquisition is that "which . . . may be eligible under the law". Petitioner ignores this requirement and does not even suggest what costs are eligible under the law. The only reference in a previous Texas statute to costs being eligible is in Vernon's Ann. Civ. Stats., Article 6674w-4, providing that relocation of a utility on an interstate highway shall be made "at the cost and expense of the State of Texas provided that such relocation is eligible for Federal participation". *State* v. *City of Austin*, 331 S.W. 2d 737 (Tex. Sup. 1960). The highways here were not a part of the Interstate Highway System. Nothing in Article 6679n-3 or any other statute, declares that contracts of the character of Petitioner's involve a cost "eligible under the law". Since Vernon's Ann. Civ. Stats., Article 1436b[3] requires a utility to relocate its pipes on new right-of-way at its own expense, Petitioner's cost is not "eligible under the law".

The statute purports to validate eligible costs of relocation and adjustment made in connection with "the acquisition" of rights-of-way by a county. Inasmuch as Respondent did not seek to acquire right-of-way or adjustment, and the cost is not eligible, the Court correctly held that the statute

---

[3] Appendix p. 30.

neither expressly nor impliedly deals with the situation involved here.

B. Petitioner's Construction of Article 6674n-3 Renders Section 2 Void

Recognizing that its first opinion held that the contracts were *void*, the court below held that a statute attemping to validate these contracts made without authority of law would conflict with Section 53 and 52, Article III, Tex. Const. The court did not suggest conflict with Sections 44, 51, and 55, Article III; it noted that, to be properly understood, Sections 52 and 53 must be considered with the latter sections.

Finding no controlling decisions construing the provision of Section 53 prohibiting the Legislature from authorizing payment of any claim created against a county "under any agreement or contract, made without authority of law",[4] the court turned to authorities construing Section 44. These decisions, which are reviewed in the opinion, manifest that if Article 6674n-3 is construed as attempting to validate Petitioner's contracts, it is an authorization to pay a claim created under a contract made without authority of law.

The Court correctly noted that by its express terms Section 53 does not become effective until after the event giving rise to a controversy. The prohibition on the Legislature does not apply until *after* a county has made a contract without authority of law. Just as a new constitutional provision may prohibit ratification of a contract by depriving the Legislature of the power to initially authorize such contract, the proscription in Section 53 intervenes between

---

[4] Section 53 "places similar restrictions on the Legislature with respect to counties and municipal corporations as is placed by Section 44, Article III, on the State as to State officers and contractors and State claims". Interpretative Commentary, Vernon's Tex. Const., Vol. 1, p. 736.

the making of a county contract and attempted validation by the Legislature. In the former instance, the Legislature is deprived of the power of ratification, *Katzenberger* v. *City of Aberdeen,* 121 U.S. 172 (1887), and *Armstrong* v. *Walker,* 73 S.W. 2d 520 (Tex. Sup. 1934), and an intervening constitutional provision depriving the Legislature of the power to initially authorize an act is indistinguishable from one prohibiting ratification. Section 53 was not adopted in the interim between the making of the contracts and the attempted ratification, but by its express terms *it became a limitation on the power of the Legislature during such interim.* It would be anomalous, indeed, to hold that a new constitutional provision curtailing initial authority is superior to an existing constitutional provision which can only apply after the making of a contract without authority of law. As the court below stated, in either event the Legislature is deprived of the power to ratify.

Petitioner's answer is an accusation that the court below erred in *equating* Section 53 with Section 44, and argument (in effect) that Section 53 is meaningless. To acquiesce in this accusation, the court would admit plagarism; the Texas Constitutional Convention of 1875, not the court below, evolved this equation.

Petitioner's insistence that Sections 44 and 53 are not equivalent because "the word 'pre-existing' does not appear in Section 53" argue that the Convention adopted a meaningless provision. Section 53 prohibits the Legislature from authorizing payment of any claim created against a county "under any agreement or contract, made without authority of law." Such a claim is one on a contract not provided for by pre-existing law. There is no magic in the word "pre-existing". The meaning of Section 53 is not changed if the word "pre-existing" is added. Prohibition of payment

under a contract "made without authority of law" necessarily prohibits payment under a contract "made without authority of pre-existing law". A law is pre-existing if it is in effect at the time a contract is made. If a contract is "made without authority of law", it is not authorized by pre-existing law. Under Petitioner's argument, Section 53 would be meaningless because there would be no situation or set of facts to which is could apply.

Petitioner also argues that there can be no issue of donation of public funds in violation of Section 52, because there was no obligation on the part of Petitioner to encase its pipelines. This is beside the point. Unless the contracts were made with authority of law, Respondent had no obligation to pay Petitioner, and its payment would be a donation of public funds. Use of public money to pay a claim predicated on facts which generate no liability constitutes a gift. *State* v. *City of Austin*, 331 S.W. 2d 737 (Tex. Sup. 1960).

Unless Sections 53 and 52 are nullities, the Court of Appeals correctly held that Petitioner's construction of the statute violates their prohibitions.

C. The Decision Does Not Conflict with Applicable State Law

The petition fails to show that the Court of Appeals "decided an important state . . . question in a way in conflict with the applicable state . . . law". Rule 19, Supreme Court Rules. Petitioner cites no decision of a Texas court which conflicts with the decision upon "the precise issue of state law involved", *United States* v. *Durham Lumber Co.*, 363 U.S. 522 (1960), or upon the "precise statute" before the Court of Appeals, *Propper* v. *Clark*, 337 U.S. 472 (1949).

Most of the authorities cited by Petitioner deal with validation of the irregular political proceedings (incorporation, annexation, elections, etc.), not attempts to create an obligation under contracts made with authority of law, and with the exception of *Henson*,[5] none of the cases construe Section 53. As does *Henson*, several of the cases involve specially created districts and not counties or cities.

Contrary to Petitioner's assertion, *Henson* does not involve a situation "where the county's road bonds had been void when issued but had been validated by subsequent curative statutes". Henson sued "to enjoint the collection of" a tax levy by "Road District No. 13 of Henderson County". The district urged a validating act, and the court held that Section 53 "has no application to the subject under consideration". A tax levy of a road district, not a contract of a county, was the subject under consideration.

The prohibition of Section 53 only applies to "any county or municipality of the state, under any . . . contract". A road district is neither a county nor a municipality, and a tax levy is not a contract. Neither the Constitution of 1876 nor any prior constitution recognized any political subdivisions other than counties, cities and towns, and school districts. The Constitution of 1876, Articles IX and XI, manifest that the words "county or municipality" designate the political subdivision of the state recognized in 1876. *Welch* v. *State*, 148 S.W. 2d 876, 879 (Tex Civ. App. 1941, error ref.). Road districts were unknown in Texas until the amendment of Section 52, Article III, Constitution of Texas, in 1904. The object of this amendment was to broaden "the former restrictive powers of the Legislature" by authorizing the formation of districts composed of counties, or any number of adjoining counties, o · to any

[5] *Henson* v. *Commissioners Court of Henderson County*, 56 S.W. 2d 240 (Tex. Civ. App., 1932, error ref.)

political subdivision of the state, or defined territory, for the purpose of promoting the development of the state. *Simmons* v. *Lightfoot*, 146 S.W. 871, 872 (Tex. Sup. 1912).

Road District No. 13 of Henderson County was a "defined district within Henderson County, and not a county or political subdivision thereof. A "defined district" is a defined area in a county, less than the county, other than a political subdivision of a county. *Browning* v. *Hooper*, 260 U.S. 396 (1926); *Bell County* v. *Hines*, 219 S.W. 556, 557 (Tex. Civ. App. 1920, error ref.); Tex. Special Laws 1926, 39th Leg., 1st C.S. p. 920, Ch. 319. Since Road District No. 13 was "a defined road district" and not a county or municipality, the court correctly held that Section 53 did not apply to the subject under consideration. In refusing the application for writ of error, the Texas Supreme Court did no more than approve the holding that Section 53 does not apply to an act validating a tax levy of a defined road district.

Recognizing that neither *Henson* nor other decisions cited by Petitioner are authoritative on the issue of whether an act validating a contract of a county made without authority of law contravenes Section 53, the Court of Appeals[6] turned to decisions construing Section 44 for authoritative interpretation of Section 53. Petitioner's specious argument that Section 53 does not contain the word "pre-

[6] The Court of Appeals is composed of three judges who are constantly required to pass upon the law of Texas, including Judge Joseph C. Hutcheson, a judge with many years' experience in applying Texas law in the Court of Appeals and District Court. In the absence of a state decision deciding "the precise issue of the State law" or "construing the relevent" state statute, this Court will leave undisturbed the interpretation placed upon purely local law by a court so composed. *Spiegel's Estate* v. *Commissioner of Internal Revenue, supra; McGregor* v. *State Mutual Life Ass. Co.*, 315 U.S. 280 (1942); *United States* v. *Durham Lumber Company, supra.*

existing" does not show that the holding is "unreasonable" or clearly erroneous and "unreasonable". *United States* v. *Durham Lumber Company, supra.* The holding below is supported by reasonable argument, and if "reasonable argument can be based on [State] cases to support a determination" of the question "either for or against the Petitioner", the decision will be upheld. *Spiegel's Estate* v. *Commissioner of Internal Revenue,* 335 U.S. 701 (1949).

III.

THE DOCTRINE OF ABSTENTION IS INAPPLICABLE

Petitioner presents "no exceptional circumstances justifying abstention". *County of Allegheny* v. *Frank Meshuda Company,* 360 U.S. 185 (1959). No Federal question is presented and application of the doctrine has been limited to situations where an authoritative state decision may avoid a Federal question. *City of Meridian* v. *Southern Bell T. & T. Co.,* 358 U.S. 639 (1959); *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U.S. 25 (1959); *Martin* v. *Creasy,* 360 U.S. 219 (1959).

IV.

THE FIRST DECISION IS CORRECT AND DOES NOT CONFLICT WITH APPLICABLE STATE LAW

The Court of Appeals concluded that Respondent did not have power to pay Petitioner to encase its pipelines because (1) the Department has exclusive control of and power and duty to construct and maintain State Highways, (2) no funds of a Texas county can be expended for construction or improvement of a State highway, (3) county funds may be expended only for the purpose of acquiring

right-of-way and (4) the extension of casing on a pipeline is not incidental to acquisition of right-of-way but to construction, 311 F. 2d 882.

These holdings are not, as Petitioner claims, based solely on a construction of Vernon's Ann. Civ. Stats., Articles 6674n and 6674q-4, and *Sinclair Pipeline Co.* v. *Archer County*, 147 F. Suppl. 650 (N.D. Tex. 1956), affirmed 245 F. 2d 79, 5th Cir. 1957). The opinion evidences that the holdings rest upon a review and analysis of Texas cases defining the limited power of a county; the basic legislation creating the Department and defining its powers; all statutes relating to State Highways; Texas decisions construing such basic legislation and supplementary statutes; the *Archer County* case (and "the force and effect of Texas statutes and decisions cited in and made the basis" of such case); and other authorities cited in Respondent's brief below.

The express language of Vernon's Ann. Civ. Stats., Article 6673, 6674n and 6674q-4 requires that all improvement and construction of State highways be paid out of the State Highway fund and prohibits the counties of Texas from paying any money except for the acquisition of right-of-way. In determining that the agreement to pay Petitioner to ease its pipelines was not incidental to acquisition of right-of-way but to construction and improvement of the highway, the Court below considered *State* v. *City of Austin*, 331 S.W. 2d 737 (Tex. Sup., 1960). The State contended that Vernon's Ann. Civ. Stats., Article 6674w-4 (providing for reimbursement out of highway funds for relocation of utilities necessitated by construction of an interstate highway) violated Tex. Const. Article VIII, § 7a,[7] in

[7] This provision prescribes that certain funds "shall be used for the sole purpose of acquiring rights-of-way, constructing, maintaining and policing" public roadways.

that the cost of relocating a utility was not part of the cost of "constructing" a highway. With the point squarely presented "that utility relocation expense is not part of the cost of highway construction" the Court held "that the same is properly attributable to highway construction within the meaning of the Constitution."

Since Petitioner sought to recover only the cost of encasement and did not seek to recover the market value of its easements, the Court below also considered the well-settled law of Texas that the measure of damages for a taking is the market value of the property taken and not the cost of adjustment. *Chicago R.I. & G. R.R. Co.* v. *Tarrant County Water Control & Improvement District*, 73 S.W. 2d 55 (Tex. Sup. 1934); *Gulf C. & S.F. Ry. Co.* v. *Milam County*, 38 S.W. 747 (Tex. Sup. 1897). Respondent made no effort to purchase or condemn Petitioner's easement.

After the first decision, Petitioner discovered Vernon's Ann. Civ. Stats., Article 6674c-1 and now urges that it authorizes a Texas county to make voluntary contributions to the department for the development of "highways in each county". This statute does not authorize a county to contribute to the development of State highways, but to "public roads of such county". Under Vernon's Ann. Civ. Stats., Chapter 2, Title 116, Texas counties still establish and maintain *county roads* which are not a part of the State highway system. Vernon's Ann. Civ. Stats., Article 6667 authorizes the Department to render assistance to counties with reference to public roads, and Article 6674c-1 was enacted to provide a means for counties to contribute funds to the Department to be used in the development of *County roads, not State highways.*

Clark v. *Greer*, 232 S.W. 2d 876 (Tex. C.A. 1950) does not determine "that what may be done indirectly through the Highway Department, may also be done directly by the county . . . involved". *Clark* approves a conveyance by a *city* to the Highway Commission but expressly notes that the question of the city's power to condemn a right-of-way for a State highway was not considered. Since the application of the statute is limited to "any county or political subdivision of any county in this State" *Clark* unnecessarily and erroneously cites the statute. A Texas city is a political subdivision of the State — not of a county. *Supreme Forest Woodmen's Circle* v. *City of Belton*, 100 F. 2d 655 (C.C.A. 5, 1938); *Ex parte Ernest*, 136 S.W. 2d 595 (Tex. Crim. App., 1940); *Cofield* v. *Britton*, 109 S.W. 2d 493 (Tex. C.A. 1908, err. dism.).

There is no question of implied repeal of Article 6673 by either of Articles 6674n, 6674q-4 or 6674c-1. The latter statutes are consistent in the limitation that no county funds may be expended on a State highway except for acquisition of right-of-way, and by its own terms Article 6674c-1 is inapplicable to State highways.

Petitioner urges conflict with *McLennan County*, *Sinclair Pipeline Co.*, and *Magnolia Pipeline Co.*[8] Neither *McLennan County* nor *Sinclair Pipeline Co.* construes the statutes considered or decides the precise question in issue. The question of whether an agreement to pay for casing a gas pipeline is an incident of construction or an incident of acquisition of right-of-way was neither raised nor decided. Each involved the lowering of a pipeline, not encasement.

---

[8] *McLennan County* v. *Sinclair Pipeline Co.*, 323 S.W. 2d 471 (Tex. Civ. App. 1955, error ref. n.r.e.); *Sinclair Pipeline Co.* v. *State*, 332 S.W. 2d 58 (Tex. Civ. App. 1959); *Magnolia Pipeline Co.* v. *City of Tyler*, 348 S.W. 2d (Tex. Civ. App. 1961, error ref.)

Sinclair Pipeline Co. is a condemnation suit in which the county sought and obtained a judgment condemning "an easement of right-of-way". During required negotiations for the purchase of the company's easement, the company lowered and encased its pipeline upon agreement for reimbursement. The Court of Civil Appeals reversed the trial court judgment awarding no damages, holding that since, by the condemnation suit, the company's easement had been taken, the measure of damages was the cost of adjustment. Having initiated condemnation proceedings, the county could not deny its power to condemn, and Sinclair did not question, but conceded that right. Under the record, no question as to the power of the county under the applicable statutes could have been presented.

Only lowering, not casing, a pipeline is involved in *McLennan County*, and none of the statutes applicable here are even cited. The case relies heavily upon *Sinclair Pipeline Co.* without recognizing the fundamental differences in a condemnation suit and the suit presented. Contrary to Petitioner's assertion that the court "refused to follow the federal courts' holding in the Archer County case", the court misconstrued *Archer County* and followed its own misconstruction. The court states that "the Archer County case holds . . . that Sinclair's easement was in that case taken" and that "the Archer County case is not contrary to the foregoing but actually supports the result herein reached". *Archer County* held that Sinclair's easement was *not* taken, and if the applicable statutes had been presented in *McLennan County*, *Archer County* would not support the court's holding. No issue as to the power of a county to pay for lowering a pipeline on a state highway being presented, the court disposed of the case on the assumption that the county had such power.

Magnolia Pipeline Co. does not hold "that counties and cities in Texas may be required to compensate for adjustments of pipelines crossed by new streets or highways and, therefore, have power to do so." The case holds that a *city* which uncovered pipelines while cutting and grading one street and "attempting to pave very near" a pipeline on another street, is liable for the cost of lowering and encasing of such pipelines because the necessity for such adjustments resulted from the street improvement. No question of the taking of an easement was involved because the city street had been placed over the easement several years prior to the paving project prompting the suit. This case decides issues relating to a city, not a county; a city street, not a state highway; improvement of a city street; not acquisition of right-of-way for a state highway. Liability was based upon the results of improving streets; the statutes governing counties and highways were not construed; and the precise issue here was not decided. The precise issue was more nearly involved in *State* v. *City of Austin, supra*, and the Texas Supreme Court held that relocation expense was a part of construction.

If the decision below had been that of a Texas intermediate court, the Texas Supreme Court would not have had jurisdiction to review it on the ground of conflict with *Sinclair Pipeline Co., McLennan County*, or *Magnolia Pipeline Co.* Vernon's Ann. Civ. Stats., Article 1728, authorizes the Supreme Court to review a decision of a Court of Civil Appeals when "one of the Courts of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals . . . upon any question of law material to a decision of the case." Decisions are not in conflict unless they are "so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other". *Dockum* v. *Mercury Ins. Co.*, 135 S.W. 2d 700 (Tex.

Sup. 1940). Petitioner here seeks review upon the ground of conflict when there is not a conflict under state law which would vest jurisdiction in the Texas Supreme Court.

The opinions of the Attorney General are irrelevant and superficial. They assume that a requirement for adjustment of pipelines involves acquisition of right-of-way and do not discuss or rule on the extent of a county's power under the statutes construed by the court below. None of the opinions consider or discuss the relative duties of the Department and counties and the difference between construction and acquisition of right-of-way. Each demonstrates, without recognizing, the difference between acquisition of right-of-way and paying for adjustment of a pipeline, by noting that if a price cannot be agreed upon, the county will have to "condemn the easement" — not condemn the right to lower or case the pipeline. WW-125 points out that the cost of lowering an encasement would not be a separate issue, but would be considered in the general issue of the value of the easement taken. Unless an easement is taken, there is no acquisition of right-of-way. Moreover, as evidenced by WW-1090, the opinions recognize no distinction between a county road and a state highway.

V.

ASSUMING CONFLICT, THE COURT BELOW WAS NOT REQUIRED TO FOLLOW McLENNAN COUNTY AND SINCLAIR PIPELINE COMPANY

Petitioner erroneously argues that the court below was required to follow *McLennan County* and *Sinclair Pipeline Co.*, decisions of intermediate courts. The "law of the state" is determined "from all the available data", including decisions of intermediate courts, but where decisions of intermediate courts may be ignored by other courts of similar jurisdiction, the Federal court is not bound by them. *West* v.

American Telephone & Telegraph Co., 311 U.S. 223 (1940); *King* v. *Order of United Commercial Travellers of America*, 333 U.S. 153 (1948).

McLennan County and *Sinclair Pipeline Co.* are without precedential value. The Texas Supreme Court was not requested to review the latter and refused to approve the former by entering the notation, "Refused. No Reversible Error".[9] There are thirteen Courts of Civil Appeals in Texas; the doctrine of stare decisis is not applicable to decisions of these courts, and one court is not bound to follow the decision of another unless it is satisfied with the reasoning.[10] Since a Court of Appeals "adjudicating a state-created right solely because of diversity of citizenship of the parties is for that purpose, in effect, only another court of the state", *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108 (1945), it can have no obligation greater than that of a Texas Court of Civil Appeals. The court below was no

---

[9] The precedential value of opinions of Courts of Civil Appeals is determined by the notation of the Texas Supreme Court in refusing to review them. When the notation is "Refused. No Reversible Error", it means, and only means, that the application for writ of error presented no error which required reversal (through omission or otherwise), and does not mean that the Supreme Court approves any holding or the judgment entered. Such cases "are but persuasive only, with little precedential value". Calvert, *The Application for Writ of Error*, 3 Franki. Texas Rules of Civil Procedure 404 (1955); Simpson & Wall, *Problems of Precedent Affecting Courts of Civil Appeals' Opinions*, 4 S.W.L.J. 398 (1950); Simpson, *Notations on Application for Writ of Error*, 12 Texas Bar Journal 547 (1949). Entry of this notation by the Texas Supreme Court, like denial of a petition for writ of certiorari by this Court, "imports no expression of opinion upon the merits of the case". *Agoston* v. *Commonwealth of Pennsylvania*, 340 U.S. 844 (1950).

[10] *Calvary Temple* v. *Taylor*, 288 S.W. 2d 868 (Tex. Civ. App. 1956); *General American Life Ins. Co.* v. *Rios*, 154 S.W. 2d 191 (Tex. Civ. App. 1941, reversed on other grounds 164 S.W. 2d 521); *Malone* v. *United States Fidelity & Guaranty Co.*, 9 S.W. 2d 461 (Tex. Civ. App. 1928).

more bound by *McLennan County* and *Sinclair Pipeline Company* than other Texas Courts of Civil Appeals.

The status of a decision of a Texas Court of Civil Appeals is more comparable to the common pleas decision considered in *King, supra,* than opinions of intermediate and lower courts considered in *State of California* v. *Taylor,* 353 U.S. 553 (1957) and *Fidelity Union Trust Company* v. *Field,* 311 U.S. 169 (1940). Like a decision of the court of common pleas of South Carolina, an opinion of the Court of Civil Appeals is not taken in the state as "authoritative expositions of that state's 'law' ", does not exact conformity from the same court or other courts of civil appeals or lesser court, and may be ignored by other courts of civil appeals. As *King* concludes, "it would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court".

Irrespective of the precedential value of these cases, there is "persuasive data that the highest court of the state would decide otherwise", *King, supra:* the refusal of the Texas Supreme Court to approve the decisions cited by Petitioner; the decision in *State* v. *City of Austin, supra,* that cost of relocation is an expense of construction; the Texas statutes (none of which was reviewed by such decisions); and the *Archer County* case.

VI.

THE DECISION DOES NOT CONFLICT WITH FEDERAL DECISIONS

None of the Federal decisions cited by Petitioner decides the question of whether encasement of a pipeline is an incident of construction or an incident of acquisition of right-of-way as those terms are used in Texas statutes, or construe any of the Texas statutes or adjudicate the power of a Texas county. While these cases characterize certain

acts as "takings", they actually refer to a damaging. Under Texas law, Petitioner's easements have not been taken, as Petitioner is still using them, and any result from the construction of the highway is a damaging — not acquisition of right-of-way.

VII.

ADDITIONAL GROUNDS PRESENTED TO THE COURT OF APPEALS

In addition to the grounds stated in the first opinion, Respondent presented other grounds which support the judgment and require denial of the writ. *LeTulle* v. *Scofield*, 308 U.S. 415 (1940); *Langnes* v. *Green*, 282 U.S. 531 (1931).

A. Assuming an Agreement to Pay For the Cost of Encasement is Acquisition of Right-of-Way, Conditions Precedent to Vesting Such Power in Respondent Were Not Performed

A Texas county only has such powers as are expressly granted by statute and must exercise such powers in the manner prescribed. When a condition precedent to exercise of a power is imposed, the condition must be performed if the power is to be exercised. *Canales* v. *Laughlin*, 214 S.W. 2d 451 (Tex. Sup. 1948). Precedent to delegating power to a Texas county to acquire right-of-way for a state highway, the State Highway Commission must determine the necessity for acquiring the right-of-way, contract for the county to acquire the right-of-way, request the county to acquire particular parcels and furnish the county plats or field notes and right-of-way deeds of the parcels to be acquired. Vernon's Ann. Civ. Stats., Article 6674n.

A county is authorized to acquire right-of-way only when "in the judgment of the Texas Highway Commission" such acquisition is necessary. There is no evidence that the State

Highway Commission determined that acquisition of right-of-way from Petitioner was necessary. Article 6674n is permissive and does not impose any duty on a county to acquire right-of-way until it has contracted to do so. *Traders' Compress Co.* v. *State*, 77 S.W. 2d 245 (Tex. Civ. App. 1934); *Sinclair Pipeline Company* v. *Archer County*, 245 F. 2d 79 (CCA 5, 1957). Article 6674n charges the Commission with the duty of furnishing the county "plats or field notes of such right-of-way or land . . . *after* which the Commissioners Court may and is hereby authorized to purchase or condemn the same . . . in accordance with such field notes". The Commission did not request Respondent to acquire right-of-way from Petitioner, and although the Commission furnished Respondent plats, field notes and right-of-way deeds (with the name of each grantor) on all parcels of land desired, it furnished none as to Petitioner's easements. The furnishing to a county by the Commission of information necessary to negotiate and condemn is a condition precedent to vesting power to acquire right-of-way. *Sacred Gardens of Memory, Inc.* v. *State*, 334 S.W. 2d 220 (Tex. Civ. App. 1960); *Sinclair Pipeline Company* v. *Archer County, supra.*

A county is "authorized to purchase or condemn" right-of-way "after" it has been furnished this information. The mandate to furnish field notes "for purchase or condemnation" necessarily includes a duty to furnish the name of the grantor. Article 6674n contemplates a purchase, and condemnation if purchase is impossible. It requires the county to follow the procedure of the general condemnation statutes, under which proof, negotiation with the owner is a condition precedent to vesting jurisdiction of a condemnation case in the courts. *City of Houston* v. *Derby*, 215 S.W. 2d 690 (Tex. Civ. App. 1948, error ref.).[11] Until the commis-

[11] By unqualifiedly refusing the writ of error in this case, the Texas Supreme Court adopted the opinion as its own. *Biggers* v. *Continental Bus System*, 303 S.W. 2d 359, 364 (Tex. Sup. 1957).

sion had furnished field notes and the name of the grantor to Respondent, it could not attempt to comply with the statutory condemnation procedure.

The State Highway Commission not having requested acquisition of Petitioner's easements or furnished data necessary for acquisition, the conditions prescribed by the statute were not performed and the power to acquire right-of-way from Petitioner did not vest in Respondent.

B. Petitioner's Encasement Was the Performance of a Legal Duty Assumed as An Incident of Exercising The Privilege of Placing its Pipelines Across State Highways

The Legislature of Texas has plenary power over its highways, may delegate this power to other arms of the State, and may grant ultilities the privilege of crossing highways, *State* v. *City of Austin*, 331 S.W. 2d 737 (Tex. Sup. 1960), but the power to delegate control of highways and to grant privileges is subject to an important constitutional limitation. Tex. Const., Article I, Section 17, provides in pertinent part:

> "• • • no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the Legislature or created under its authority shall be subject to the control thereof."

Under the mandate of this section, whether expressed in the statute or not, legislative grant to a utility of the privilege of crossing a highway is subject to the continued control of the state or its arm to impose additional burdens upon the exercise of the privilege. *Storrie* v. *Houston City St. Ry. Co.*, 46 S.W. 796 (Tex. Sup. 1893); *Mayor of City of Houston* v. *Houston City St. Ry. Co.*, 19 S.W. 127 (Tex.

Sup. 1892); *Fleming* v. *Houston Lighting & Power Co.*, 138 S.W. 2d 520 (Tex. Sup. 1940); *Southwestern Telephone & Telegraph Co.* v. *City of Dallas*, 174 S.W. 636 (Tex. Civ. App. 1915, error ref.). Constitutional and statutory provisions of this import reserve to the state the right to impose additional burdens on the exercise of a privilege, and a utility accepts a privilege upon the condition that additional burdens imposed by the state will be performed. *Hamilton Gaslight & Coke Co.* v. *City of Hamilton*, 146 U.S. 258 (1892); *Sioux City Street Ry. Co.* v. *Sioux City*, 138 U.S. 98 (1891). These authorities sustain the power of the Legislature of Texas to require a utility accepting the privilege of laying a pipeline across a state highway, as an incident of exercising the privilege, to assume the additional burden of casing its pipeline in right-of-way acquired for widening the highway.

In generously granting railroads and utilities the privilege to lay and maintain their facilities across public highways, the Legislature has exercised this power. Vernon's Ann. Civ. Stats., Articles 6320, 6327, 1436, 1436b and 1497.[12] These statutes impose the burden upon an accepting utility or railroad to adjust its lines, in or outside of the original bounds of a highway or stream, to conform to public improvements. It is arguable that the language of the utility statutes does not clearly state that a utility has the burden to adjust its lines for subsequent improvement or widening, but judicial construction of similar language in the railroad statutes removes the argument.

Articles 6320 and 6327 require railroads crossing a public highway or stream to restore the highway or stream "to its former state, or to such state as not to unnecessarily impair its usefulness", and to keep its roadbed across any highway "in a proper condition for the use of the travelling

[12] Appendix pp. 37, 34, 35.

public". Like the utility statutes, this language does not expressly require a railroad to adjust facilities outside of the original bounds of a highway or stream to conform to improvement or widening thereof, but "informed local courts" have found "meaning not discernable to the outsider". *Louisiana Power & Light Co.* v. *City of Thibodeaux*, 360 U.S. 25 (1959). The quoted language requires railroads to make such changes in their lines, in or outside of the bounds of the original highway or stream, as the state may require in improving or widening the public way. *Chicago R.I. & G. RR. Co.* v. *Tarrant County Water Control & Improvement District*, 73 S.W. 2d 55 (Tex. Sup. 1934); *Missouri K & T R. Co.* v. *Rockwall County Levee Improvement District*, 297 S.W. 206 (Tex. Sup. 1927); *Gulf C. & S.F. Ry. Co.* v. *Milam County*, 38 S.W. 747 (Tex. Sup. 1897).

The similar language of the pipeline statutes has not been construed, but since the cases construing the railroad statutes were decided long prior to enactment of the utility statutes, their judicial construction "must be read into the analogous pipeline statutes". *Lone Star Gas Company* v. *State*, 153 S.W. 2d 681 (Tex. Sup. 1941); *Humble Pipe Line Co.* v. *State*, 2 S.W. 2d 1018 (Tex. Civ. App. 1928, error ref.).

The mandate of the Texas Constitution must be read into every statutory grant of a privilege, and compels the Texas Supreme Court to "read into the analogous pipeline statutes" the judicial construction of the railroad statutes that privileges granted are subject to the continuing duty of the railroad to adjust its lines for widening or improving of a highway. As judicially construed, the privilege of using the highways imposed (as a condition of the grant) the duty on Petitioner to make such adjustments as the

state might thereafter require in improving or widening the highway. Petitioner was not obligated to accept the privilege, but did so subject to the condition that it would comply with the requirement of the state for improving or widening the highway. When the Highway Department so requested, Petitioner had a legal duty to encase its pipelines in the widened areas.

Irrespective of the pipeline statutes, however, the Department had the power and duty to require the questioned encasement. Read in the light of the Texas Constitution, Vernon's Ann. Civ. Stats., Articles 6663, 6673, 6665, 6667, 6666, and 6674q-4 evidence a complete delegation of the power of the State to control state highways, with its attendant duty of exercising continued control over privileges and franchises to use highways. Under this delegated power and duty the Department required that all gas lines be cased from right-of-way line to right-of-way line (all of 186), and after Petitioner's acceptance of a permit under this regulation, requested encasement in the widened area. Such request was an exercise of the constitutionally reserved power; Petitioner owed a legal duty to comply with the request; and performance of this legal duty was not consideration for any alleged promise of Respondent to pay for its costs.

C. Petitioner's Encasement was the Performance of a Legal Duty in Response to the Exercise of the Police Power

Upon a record that "failed to disclose that Appellant's lines were the cause of serious damage to the public" *Panhandle Eastern Pipeline Company* v. *State Highway Commission*, 294 U.S. 613 (1935), declared that, in exercising the police power, pipelines are not upon the same footing

as railroads. This record shows that an unencased pipeline constitutes a definite hazard to vehicular traffic, the highway and the pipeline (R. 28, 59, 70, 97, 115 and 116). Recognizing the danger of explosion, with its consequent injury to persons, property and the highway, the Department requested Petitioner to make the additional encasement. Despite *Panhandle Eastern*, this is a proper basis for invoking the police power. This case has never been cited by this Court, and the change of conditions since 1935 may well be the reason for its lack of citation. Compared with today, the automobile industry was in its infancy in 1935, and while no question of public safety may have been apparent then, with the present vehicular traffic and roads and modern highways, the requirement of encasement is necessary to protect the public.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM ROBERT SMITH
1508 Tower Life Building
San Antonio 5, Texas
Counsel for Respondent

Of Counsel:

SEARS AND BURNS
ROBERT L. BURNS
1811 C & I Life Building
Houston 2, Texas

CERTIFICATE OF SERVICE

The undersigned counsel for Respondent, Hardin County, a member of the bar of the Supreme Court of the United States, certifies that a copy of the foregoing Brief in Opposition has been served upon Petitioner, Trunkline Gas Company, by delivering same to Mr. Cecil N. Cook, 1100 Esperson Building, Houston 2, Texas, counsel for Petitioner, in person, this ..... day of August, 1964.

.....

WILLIAM ROBERT SMITH

Counsel for Respondent

Statutes

Vernon's Ann. Civ. Stats., Article 1436 (Revised Civil Statutes of Texas of 1925, Vol. I, p. 427, Art. 1436)

> Such corporation shall have the right and power to enter upon, condemn and appropriate lands, right of way, easements and property of any person or corporation, and shall have the right to erect its lines over and across any public road, railroad, railroad right of way, interurban railroad, street railroad, canal or stream in this State, any street or alley of any incorporated city or town in this State with the consent and under the direction of the governing body of such city or town. Such lines shall be constructed upon suitable poles in the most approved manner and maintained at a height above the ground of at least twenty-two feet; or pipes may be placed under the ground as the exigencies of the case may require.

Vernon's Ann. Civ. Stats., Article 1497 (Revised Civil Statutes of Texas of 1925, Vol. I, p. 440, Art. 1497)

> Such corporation shall have the right and power to enter upon, condemn and appropriate the lands, right of way, easements and property of any person or corporation. Such corporation shall have the right to lay its pipes and pipelines across and under any public road or highway, or under any railroad, railroad right of way, street railroad, canal or stream in this State, and to lay its pipes and pipe lines across or along and under any street or alley in any incorporated city or town in this State with the consent and under the direction of the governing body of such city or town. No pipe lines shall be laid parallel with and on any public highway, closer than fifteen feet from the improved section thereof, except with the approval and under the direction of the commissioners' court of the county in which such highway is located. Said pipes and pipe lines shall be so buried and covered as not to interfere with the use and occupancy of such road,

highway, street or alley by the public, or use and occupancy of such railroad or street railroad by the owner or owners thereof. Such pipes or pipe lines shall not pass through or under any cemetery, church or college, school house, residence, business, or storehouse, or through or under any building in this State, except by the consent of the owner or owners thereof. All such pipes and pipe lines, when same shall pass through or over the cultivated or improved lands of another, shall be well buried under ground at least twenty inches under the surface, and such surface shall be properly and promptly restored by such corporation unless otherwise consented to by the owners of such land. When such pipes and pipe lines shall be laid over or along any uncultivated or unimproved lands of another, and such lands shall thereafter become cultivated or improved, such pipes or pipe lines shall be buried by said corporation as herein provided for cultivated lands, within a reasonable time after notice by the owner of such lands, or his agent, to said corporation or any agent thereof.

Vernon's Ann. Civ. Stats., Article 1436b (Texas Acts 1951, 52nd. Leg., Ch. 470, p. 829)

Section 1. Any person, firm or corporation or incorporated city or town engaged in the business of transporting or distributing gas for public consumption shall have the power to lay and maintain pipes, mains, conductors and other facilities used for conducting gas through, under, along, across and over all public highways, public roads, public streets and alleys, and public waters within this State; provided that within the corporate limits of an incorporated city or incorporated town such right shall be dependent upon the consent and subject to the direction of its governing body. Any such person, firm or corporation or incorporated city or town shall notify the State Highway Commission or the Commissioners Court having jurisdiction, as the case may be, when it proposes to lay any such pipes, mains, conductors

and other fixtures for conducting gas within the right-of-way of any state highway or county road outside the limits of an incorporated city or incorporated town, whereupon the Highway Commission or the Commissioners Court, if it so desires, may designate the place upon the right-of-way where the same shall be laid. The public agency having jurisdiction or control of a highway or county road, that is, the Highway Commission or the Commissioners Court, as the case may be, may require any such person, firm or corporation or incorporated city or town at its own expense to relocate its pipes, mains, conductors or other fixtures for conducting gas on a state highway or county road outside the limits of an incorporated city or incorporated town so as to permit the widening or changing of traffic lanes, by giving thirty (30) days written notice to such person, firm or corporation or incorporated city or town and specifying the facility or facilities to be moved and indicating the place on the new right-of-way where such facility or facilities may be placed. Such person, firm or corporation or incorporated city or town shall replace the grade and surface of such road or highway at its own expense.

Sec. 2. If after the effective date of this Act an unincorporated area becomes incorporated, any person, firm or corporation or incorporated city or town which, at the date of such incorporation, has pipes, mains, conductors or other facilities within such area so incorporated, may continue to exercise the rights conferred by Section 1 hereof for ten (10) years after the date of such incorporation without consent but subject to the direction of the governing body.

Sec. 3. [General repealer.]

Sec. 4. If any section, sentence, phrase, clause or any part of any section, sentence, phrase or clause of this Act shall for any reason be held invalid, such decision shall not affect the remaining portions of this Act; and it is hereby declared to be the intention of this Legislature to have passed each section, sentence, phrase, clause, or part thereof, irrespective of the fact

that any other section, sentence, phrase or clause or part thereof may be declared invalid.

Vernon's Ann. Civ. Stats., Article 6021 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1720, Art. 6021)

> The right to run pipe lines, telegraph and telephone lines along, across or over any public road or highway can only be exercised upon condition that the traffic thereon be not interferred with, and that such road, or highway be promptly restored to its former condition of usefulness, and the restoration therof to be subject also to the supervision of the commissioners court or other proper local authority. In the exercise of the privileges herein conferred, such pipe lines shall compensate the county or road district, respectively, for any damage done to such public road. Nothing herein shall be construed to grant any pipe line company the right to use any public street or alley of any incorporated city or town, except by express permission from the governing body thereof.

Vernon's Ann Civ. Stats., Article 6320 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1798, Art. 6320)

> Such corporation shall have the right to construct its road across, along, or upon any stream of water, water course, street, highway, plank road, turnpike, or canal when the route of said railway shall intersect or touch; but such corporation shall restore the stream, water course, street highway, plank road, turnpike, or canal thus intersected or touched, to its former state, or to such state as not to unnecessarily impair its usefulness, and shall keep such crossing in repair.

Vernon's Ann. Civ. Stats., Article 6327 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1799, Art. 6327)

> Every railroad company in this State shall place and keep that portion of its roadbed and right of way, over or across which any public county road may run, in

proper condition for the use of the traveling public, and in case of its failure to do so for thirty days after written notice given to the section boss of the section where such work or repairs are needed by the overseer of such public road, it shall be liable to a penalty of ten dollars for each week such railroad company may fail or neglect to comply with the requirements of this article. Such penalty shall go to the road and bridge fund of the county in which the suit is brought; and the county attorney, upon the making of an affidavit of the facts by any person, shall at once institute against the company violating any provision of this article suit in the proper court to recover such penalty or penalties, and his wilful failure or refusal to do so shall be sufficient cause for his removal from office, unless it is evident that such suit could not have been maintained. The proceedings under this article shall be conducted in the same manner as civil suits. The county attorney attending to such suits shall be entitled to a fee in each case of ten dollars, to be taxed as costs; provided, that when two or more penalties are sought to be recovered in the same suit, but one such fee shall be allowed. Such suits shall be conducted in the name of the county, and if the county be cast in the suit no costs shall be charged against it.

Vernon's Ann. Civ. Stats., Article 6663 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1898, Art. 6663)

The administrative control of the State Highway Department, hereinafter called the Department, shall be vested in the State Highway Commission, hereinafter called the Commission, and the State Highway Engineer. Said Department shall have its office at Austin where all its records shall be kept.

Vernon's Ann. Civ. Stats., Article 6665 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1898, Article 6665)

The Commission shall hold regular meetings once each month. They shall attend the same and such

special or called meetings as they may provide by rule or the chairman may call. They shall formulate plans and policies for the location, construction and maintenance of a comprehensive system of State highways and public roads. They shall biennially submit a report of their work to the Governor and the legislature, with their recommendations and those of the State Highway Engineer. A quarterly statement containing an itemized list of all moneys received and from what source and of all money paid out and for what purpose shall be prepared and filed in the records of the Department and a copy sent to the Governor. These records shall be open to public inspection.

Vernon's Ann. Civ. Stats., Article 6666 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1898, Art. 6666)

The Commission shall establish and make public proclamation of all rules and regulations for the conduct of the work of the Department as may be deemed necessary, not inconsistent with the provisions of law. They shall maintain a record of all proceedings and official orders and keep on file copies of all road plans, specifications and estimates prepared by the Department or under its direction.

Vernon's Ann. Civ. Stats., Article 6667 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1899, Art. 6667)

The Department shall collect information and compile statistics relative to the mileage, character and condition of the public roads in the different counties, and the cost of construction of the different classes of roads in the various counties. It shall investigate and determine the methods of road construction best adapted to the different sections of the State, and shall establish standards for the construction and maintenance of highways, bridges and ferries, giving due regard to all natural conditions and to the character and adaptability of road building material in the different counties. The Department may, at all reasonable

times, be consulted by county and city officials for any information or assistance it can render with reference to the highways within such counties or cities, and it shall supply such information when called for by city or county officials; and it may in turn call upon all such officials for any information necessary for the performance of its duties hereunder. Upon request of the commissioners court of any county, the Department shall consider and advise concerning general plans and specifications for all road construction to be undertaken from the proceeds of the sale of bonds or other legal obligations issued by a county, or by any subdivision or defined district of a county; and such information and advice shall be so obtained before any of the proceeds from such bond issues are expended by or under the direction of the commissioners court.

Vernon's Ann. Civ. Stats., Article 6674a (Texas Acts 1925, 39th Leg., Ch. 186, p. 456, Sec. 1)

The term "highway" as used in this Act shall include any public road or thoroughfare or section thereof and any bridge, culvert or other necessary structure appertaining thereto. The term "improvement" shall include construction, reconstruction or maintenance, or partial construction, reconstruction or maintenance and the making of all necessary plans and surveys preliminary thereto. The term "Commission" refers to the State Highway Commission and the term "Department" refers to the State Highway Department.

LE COPY

Office-Supreme Court, U.S.
FILED
SEP 11 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 272

TRUNKLINE GAS COMPANY,
Petitioner,

v.

HARDIN COUNTY,
Respondent.

PETITIONER'S REPLY BRIEF

CECIL N. COOK
1100 Esperson Building
Houston, Texas 77002
Counsel for Petitioner

Of Counsel:

BUTLER, BINION, RICE & COOK
1100 Esperson Building
Houston, Texas 77002

BAKER & DANIELS
810 Fletcher Trust Building
Indianapolis, Indiana

PRINTED IN U.S.A. — BY DELARUE/TEXAS

INDEX

	Page
I. THE IMPORTANCE OF THE CASE WARRANTS THE GRANTING OF THE WRIT	1
II. THE DECISION OF APRIL 15, 1964, IS NOT CORRECT	3
CONCLUSION	5

CITATIONS

Cases

Anderson County Road Dist. No. 8 v. Pollard, 296 S.W. 1062 (Tex. Sup., 1927)	4
Henson v. Commissioner's Court of Henderson County, 56 S.W. 2d 240 (Tex. Civ. App., 1932, errer refused)	3, 4

Constitutional Provisions

Texas Constitution, Article III, Section 53	4

Statutes

Vernon's Annotated Civil Statutes, Article 6674n-3	2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 272

TRUNKLINE GAS COMPANY,

Petitioner,

v.

HARDIN COUNTY,

Respondent.

PETITIONER'S REPLY BRIEF

To The Honorable Earl Warren,
Chief Justice of the United States,
and The Associate Justices of
The Supreme Court of the United States:

Respondent's brief in opposition attempts to gloss over the real and important issues in this case by a prolixity of artfully contrived but specious arguments. Petitioner, Trunkline Gas Company, files this Reply Brief to correct some of the larger erroneous assertions made in Respondent's brief.

I.

THE IMPORTANCE OF THE CASE WARRANTS THE GRANTING OF THE WRIT

In support of its first point, that there is no reason for the Court to grant a writ of certiorari in this case, Respond-

ent first argues that the Court of Appeals stated the validating act, Article 6674n-3, does not apply to this case and that Petitioner does not attack this construction of the statute. The statement in the second opinion of the court below (Supp. R. 85-97), as to inapplicability of the new statute, was obviously added as an after-thought, in an attempt to buttress the balance of the opinion and the judgment. In any event, Respondent's assertion to the contrary notwithstanding, Petitioner, at pages 12 to 13 of its petition for a writ of certiorari, has directly attacked and shown to be erroneous the statement of the court below that the new statute does not deal with the situation involved in this case.

Respondent also urges under its first point that this case is isolated and, therefore, not important enough to warrant consideration by this Court. In so doing, Respondent ignores the following:

(i) The statement by the court below that the case involves "constitutional questions of great moment and import";

(ii) The emergency clause of the new statute, showing that the first judgment of the Court of Appeals, now re-entered, created an emergency; and

(iii) The testimony of Respondent's County Judge, at pages 158 to 159 of the record printed for use in the court below, that Petitioner's case is one of a great number, which shows the importance of this case to Respondent, to the rest of the State, and to the entire pipe line industry, as well as to Petitioner.

Clearly, neither the constitutional questions nor the other questions involved are "episodic," as Respondent would have the Court believe.

II.

THE DECISION OF APRIL 15, 1964, IS NOT CORRECT

The new statute, Article 6674n-3, is applicable and is not unconstitutional. Respondent's arguments to the contrary are answered in the petition for writ of certiorari. However, Petitioner does respectfully call the Court's attention to important misstatements in Respondent's brief (page 13) with respect to *Henson* v. *Commissioners Court of Henderson County*, 56 S.W. 2d 240 (Tex. Civ. App., 1932, error refused). Respondent states (i) that the case did not involve a situation where void county road bonds had been validated by subsequent statutes and (ii) that a county contract was not involved. These statements, which might mislead the Court, must fail in the light of the following language from the opinion in that case:

> "During 1919, road district No. 13 of Henderson County was created, and *bonds* amounting to $75,000 payable in thirty installments, bearing 5½ per cent. annual interest were authorized; the *bonds* were regularly issued, sold, and the proceeds used to build and operate public roads in said district. On September 14, 1931, the commissioners' court of Henderson County levied an ad valorem tax of $2 on each $100 valuation of taxable property in the district for the redemption of the matured and immediately maturing *bonds* and interest thereon. George Henson, appellant, a resident property owner and taxpayer in said district, for himself and on behalf of all others similarly situated, sued the commissioners' court of Henderson County, its tax assessor and collector, to enjoin the collection of the tax levy above mentioned."
>
> • • •
>
> "The effect of the validating statutes was to legalize all such road districts, including road district No. 13, Henderson County; established their boundaries as

> selected by the petitioners and defined by the commissioners' court; ***validated all bonds issued*** and all proceedings of commissioners' court pertaining to the creation of road districts as bodies corporate; also validated the construction of public roads therein, and all *levies of taxes made for the redemption of bonds issued.*"
>
> • • •
>
> "Appellant contends, however, that the validating acts are repugnant to section 53, art. 3, of our Constitution, reading: . . .
>
> "This section, in our opinion, has no application to the subject under consideration, because of the effect that must be given the validating acts; therefore, without further discussion, we overrule appellant's contention in this respect." (Emphasis supplied.)

The Texas Supreme Court approved this opinion by refusing a writ of error without any qualifying notation. As bonds are nothing more than contracts to pay money, as county and road district bonds are not distinguishable, and as the bonds as well as the tax levies to pay them were validated, the *Henson* case is squarely in point in the present case.

Also in point, of course, are the other authorities cited in the petition for a writ of certiorari. And Petitioner would particularly call the Court's attention to the leading Texas case of *Anderson County Road Dist. No. 8* v. *Pollard*, 296 S.W. 1062 (Tex. Sup.; 1927).

Under the applicable authorities a void county contract can be authorized and ratified by a statute subsequently enacted by the state legislature. Section 53 of Article III of the Texas Constitution does not contain a requirement that a county contract be authorized by a "pre-existing" law, and the authority of law required by that section may therefore be supplied by a subsequent validating act such as that involved in this case.

CONCLUSION

The other matters presented by Respondent's brief in opposition are covered by the petition for a writ of certiorari. Petitioner will not repeat its arguments here.

For the reasons stated above and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

CECIL N. COOK
1100 Esperson Building
Houston, Texas 77002
Counsel for Petitioner,
Trunkline Gas Company

Of Counsel:

BUTLER, BINION, RICE & COOK
1100 Esperson Building
Houston, Texas 77002

BAKER & DANIELS
810 Fletcher Trust Building
Indianapolis, Indiana

PROOF OF SERVICE

The undersigned counsel for Petitioner, Trunkline Gas Company, a member of the Bar of the Supreme Court of the United States, certifies that copies of the foregoing brief have been served upon Respondent, Hardin County, by depositing same in the United States mail, with first-class postage prepaid, addressed to Mr. Wm. Robert Smith, Tower Life Building, San Antonio, Texas, and to Messrs. Sears and Burns and Mr. Robert L. Burns, 1811 C&I Life Building, Houston, Texas 77002, attorneys of record for Respondent, this 24 day of September, 1964.

CECIL N. COOK
Counsel for Petitioner